Understanding the Determinants of ICC Involvement: Legal Mandate, Power Politics, and the Crisis of Legitimacy

Alyssa K. Prorok[a], Benjamin Appel[b], Shahryar Minhas[b]

[a]*University of Illinois at Urbana-Champaign*
[b]*Department of Political Science, Michigan State University*

Abstract

What explains the initiation and escalation of International Criminal Court (ICC) involvement in a situation? In light of recent charges of bias against and challenges to the institutional legitimacy of the ICC, understanding the determinants of ICC involvement is critically important. Does the ICC get involved in those situations most in need of international attention and prosecution – i.e. those with the gravest violations of human rights and the least likelihood of domestic prosecution of the perpetrators? Or, alternatively, are the Court's decisions influenced by international politics? This paper analyzes the determinants of ICC involvement and the escalation of that involvement. We test a legal mandate argument – that ICC involvement and escalation are driven primarily by the severity of human rights violations and the lack of domestic ability or will to prosecute such violations – against a power politics argument – that economic and security relations with leading states, such as the five permanent members of the United Nations Security Council (P5) impact where the ICC will initiate investigations and how far those investigations progress. Using a variety of measures for both arguments in a country-month analysis from 2002-2015, we find that the ICC's motivations are mixed. Both the gravity of human rights violations and links to the P5 influence the ICC's decision-making.

Email addresses: `aprorok@illinois.edu` (Alyssa K. Prorok), `appelben@msu.edu` (Benjamin Appel),
`minhassh@msu.edu` (Shahryar Minhas)

On September 10, 2018, US National Security Advisor John Bolton issued a virulent critique of the International Criminal Court (ICC). Speaking to the Federalist Society, Bolton called the ICC "ineffective, unaccountable, and indeed, outright dangerous", and referred to the court as "fundamentally illegitimate".[1] While these statements reflect the policy positions of a US administration that is perhaps uniquely hostile to international institutions and efforts to advance international law, the critiques raised by Bolton are not new.

In fact, they mirror similar criticisms raised by a variety of states and international actors against the ICC over the past decade. In particular, criticism of the court has centered on two central issues: first, that the court is biased against African nations and other countries in the global south. This so-called "Africa bias" has prompted criticism from regional leaders such as Rwanda's Paul Kagame and key institutions, especially the African Union ((BBC, 2012; Murithi, 2012). In fact, in 2016 Burundi, South Africa, and the Gambia threatened and/or initiated proceedings to leave the ICC based upon claims of bias (Murphy, 2016), and in 2018 the Philippines followed suit (Villamor, 2018). The second central critique of the court, mirrored in Bolton's speech, is that it is ineffective, incapable of fulfilling its mandate to achieve justice and deter atrocities. This criticism has gained traction in recent years as arrest warrants against key heads of state such as Omar Al-Bashir have remained unexecuted and the number of convictions remains at just four (Wang, 2018; White, 2018).

These challenges to the ICC's legitimacy and effectiveness raise fundamental questions about its ability to fulfill its core mission to pursue international peace and justice. Proponents of the Court argue that it is a transformational institution with unprecedented authority to investigate and prosecute perpetrators of atrocity crimes, while

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[1]The full text of Bolton's speech is available at: (Jazeera, 2018).

critics argue the Court is biased and ineffective. Recent criticism makes clear that we must first understand where the court gets involved to fully understand its effects. Yet existing literature provides little rigorous empirical evidence regarding which of these views is more accurate. We are thus unable to answer the most basic question about the functioning of the Court: how does the ICC choose where it will act?

This paper addresses this gap by examining how the ICC's Office of the Prosecutor (OTP) selects situations for preliminary examination and formal investigation.[2] We argue that the OTP, due to its accountability to the ICC Presidency and Assembly of States Parties (ASP), has strategic incentives to prioritize both impartiality and powerful state's interests when selecting situations for examination and investigation. These two priorities, however, are often contradictory: while incentives to prioritize impartiality should lead the OTP to target perpetrators of the gravest violations of human rights when states lack the willingness or ability to hold them accountable, incentives to prioritize powerful states' interests suggest that the OTP should avoid involvement in states with close ties to the permanent five members of the security council (P5).

We test our expectations on impartiality and powerful states' interest using original data on ICC examinations and investigations from 2002 through 2016. Using these original data, we are able to track when the ICC moves from no involvement, to preliminary examination, to formal investigation. This type of ordinal data poses particular estimation challenges, as a state can only reach a formal proceeding once it has sequentially

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[2]We use the term "preliminary examination" as shorthand to refer to both preliminary examinations, the first stage of proceedings when the OTP is acting pursuant to her Article 15 authority, and the "pre-investigation phase", or the first stage of proceedings when a situation is referred by the UNSC or a state party (Schabas, 2011). As we discuss further below, the OTP has considerable discretion when it comes to determining which situations and cases it will pursue (Danner, 2003; Schabas, 2011; Stahn, 2009). We therefore focus our theoretical argument on the OTP chief prosecutor as the key actor of interest.

passed through the previous stages.[3] Typically, scholars may employ a cumulative or-dinal regression model, in which a single unobservable continuous latent variable is assumed to underlie the ordinal dependent variable. However, this type of approach would disregard that the stages of ICC involvement proceed in a sequential manner.[4] To deal with this, we introduce an approach that accounts for transitions between se-quentially ordered stages through a latent variable representation in which the tran-sition between any two stages is determined by a separate latent variable (Tutz, 1990; Albert and Chib, 2001).

The empirical analyses using this approach reveal several findings of note. First, neither impartiality nor powerful states' interests can fully explain the OTP's decision-making, suggesting that neither proponents nor critics of the court are fully correct. Specifically, the gravity of human rights abuses and concerns over domestic legal ac-countability are significant predictors of the decision to initiate a preliminary examina-tion, but do not consistently predict the transition to formal investigation. On the other hand, powerful states' interests have a significant effect on the OTP's decision to ad-vance to formal investigation, but are inconsistent predictors of the initial decision to initiate a preliminary examination. In other words, the OTP seems to be more driven by concerns over impartiality and legal mandate when deciding to initiate preliminary examinations, but more influenced by geopolitical concerns and powerful states in-terests when deciding whether to advance its preliminary examinations to the formal investigation stage.

The differential effects of these factors across the OTP's two decision stages would not have been observable using a cumulative ordinal regression model. Thus, our novel

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[3]The sequential nature of ICC situation-selection is discussed further below.

[4]Feinberg (1980) in a study of educational attainment was one of the first to note the issues of utilizing a typical ordinal framework to model a sequential process.

empirical approach allows us to uncover previously unacknowledged variation in the OTP's behavior, and our results demonstrate that the ICC's behavior is more nuanced than previously thought: the mandate is important but power politics is not absent from the OTP's decision calculi, and, perhaps most interestingly, different stages are driven by different considerations. Our empirical approach also allows us to assess claims that the court is biased against Africa in a more nuanced way by examining the Africa effect at each stage of the OTP's decision-making. We find that while Africa is certainly linked with a greater likelihood of ICC involvement overall, this effect is only consistent and most pronounced at the second stage, when the OTP must decide whether to initiate a formal investigation. These results are significant in that they bring rigorous empirical evidence to bear upon a key debate among scholars, policy-makers, and politicians regarding the role of the ICC in international politics and speak directly to recent and growing criticism of the court for its alleged case-selection biases.

Our findings also have implications for research on ICC effectiveness. Recent research on the court primarily focuses on understanding whether the ICC is capable of achieving international justice, promoting peace, and deterring human rights abuses (Appel, 2018; Hillebrecht, 2016; Jo and Simmons, 2016; Prorok, 2017). However, if the OTP systematically selects cases in which these goals are easier (or harder) to achieve, any conclusions drawn in existing research on the effectiveness of the court may be questionable. While many existing studies do address selection concerns empirically, they use a variety of different strategies that are implemented in an ad hoc manner without a clear underlying model of OTP situation selection to guide modeling of the selection process. This may account for conflicting results in existing research on the ICC's impact, and suggests that a clear understanding of OTP situation selection is critical not just in its own right, but as an important part of understandings the ICC's broader impact. Thus, before we can fully understand the ICC's effects on international peace,

justice, and deterrence, we must understand where it gets involved. By providing a more systematic understanding of OTP decision-making, therefore, this paper helps us to better conduct research on ICC effectiveness.

Finally, this paper also contributes to the broader debate about the autonomy and influence of international courts (ICs) beyond the ICC. As the international judiciary has expanded and its power increased over the past three decades, scholars have devoted significant attention to understanding whether ICs are autonomous institutions that can shape state behavior through their rulings, or whether, instead, their decisions are influenced by the states that created them. The judicial independence of ICs is also an issue of policy importance, given the increasing prominence of these institutions and the common belief that an IC's effectiveness hinges upon its independence. This paper contributes to this debate by breaking with previous research and studying the autonomy of IC *case selection*, rather than IC *rulings*. By studying the ICC's situation selection and advancement process, we demonstrate that case selection is a key decision point at which ICs may be influenced by geopolitical concerns. Our findings are relevant not only for understanding the behavior of ICs like the ICC, which has broad discretion to initiate preliminary and formal investigations, but for all ICs that have discretion when it comes to admissibility decisions. Our study demonstrates that the set of cases that makes it through admissibility decisions to a substantive rulings is likely non-random, and future research on IC autonomy must consider this selection process to fully understand constraints on IC autonomy.

Literature

The ICC has garnered significant attention from legal scholars, political scientists, and policy-makers since its inception in 2002. Because of its important role in international politics, scholars have examined a wide variety of questions centered on the

Court, beginning with how the Rome Statute developed (Deitelhoff, 2009; Fehl, 2004; Goodliffe and Hawkins, 2009) and why it has been ratified by so many states, given that accepting the Court's jurisdiction infringes upon state sovereignty (Chapman and Chaudoin, 2013; Meernik and Shairick, 2011; Simmons and Danner, 2010). Recent research has shifted toward examining the ICC's impact on key outcomes, such as achieving justice, deterrence of human rights abuses, and peace. Empirical investigations of the effects of the ICC in these areas have produced mixed results, however. Some show that ratification of the Rome Statute is associated with steps toward peace (Simmons and Danner, 2010) and improved human rights practices(Appel, 2018). Active involvement by the ICC in a situation has been shown to deter human rights abuses under some conditions (Bocchese, 2015; Hillebrecht, 2016; Jo and Simmons, 2016) but to prevent peaceful transfers of power (Ku and Nzelibe, 2006; Nalepa and Powell, 2016) and impede conflict resolution under other conditions (Prorok, 2017).

To date, little research has focused on how the Court chooses situations and cases. While several legal scholars have debated the merits of prosecutorial discretion theoretically (Goldston, 2010; SáCouto and Cleary, 2007; Schabas, 2008, e.g.,), little empirical work has been done on situation selection. To our knowledge, only two existing studies have empirically examined OTP situation selection (Rudolph, 2017; Smeulers, Weerdesteijn and Hola, 2015). While these analyses provide a useful starting point for understanding the extent to which OTP decisions are driven by legal considerations versus political constraints, they draw inconsistent conclusions about the importance of mandate versus politics. Further, both studies are limited in ways that hinder our ability to draw clear conclusions about the OTP's behavior. For example, Rudolph (2017) ignores the onset of preliminary examinations, focusing only on escalation to formal investigations. This is particularly problematic because, as we show below, ICC target selection is driven by different factors at the preliminary examination versus formal in-

vestigation stages. Drawing conclusions about the OTP's behavior based on examining only one stage, therefore, provides incomplete, or even misleading, results. Rudolph (2017) also treats the situation location, rather than the target of the examination, as his unit of analysis. This is problematic in the many cases where situation location and ICC target are not the same (e.g. Iraq situation focuses on UK violations, Comoros situation focuses on Israeli violations, etc.). The analysis done by Smeulers, Weerdesteijn and Hola (2015) also suffers from important limitations. In particular, they select only the 10 "gravest" cases for analysis, thus limiting their ability to draw conclusions about the prevalence of ICC involvement in grave versus less-grave situations. We therefore lack clear empirical evidence on this topic.

This is a critical shortcoming in research on the ICC, and international courts more broadly, for several reasons. First, before one can fully understand the ICC's effects on international peace and justice, we must first understand where it gets involved. If the OTP is systematically selecting cases that are easier (or harder) to deter or resolve, this has a critical impact on the conclusions we can draw from existing studies about the ICC's ability to deter atrocities, promote peace, and achieve justice. While many exist-ing studies do address selection concerns empirically, they use a variety of different strategies that are implemented in an ad hoc manner without a clear underlying model of OTP situation selection to guide modeling of the selection process. This may account for conflicting results in existing research on the ICC's impact, and suggests that a clear understanding of OTP situation selection is critical not just in its own right, but as an important part of understandings the ICC's broader impact.

Second, this is a particularly troubling gap from a policy perspective, given that the Court has come under increasing scrutiny in recent years for its alleged bias toward in-vestigating weak, poor states in the global South while overlooking violations by strong, Western nations (Murithi, 2012). We have little clear, systematic evidence to either com-

bat or confirm such a claim. Understanding the Court's decision-making process is important, therefore, as it touches on the fundamental role of the ICC in world politics.

More broadly, the ICC is indicative of a broader contemporary trend toward the expansion of the international judiciary. From just six permanent courts in 1989, there are now "at least twenty-four permanent international courts that have collectively issued over 37,000 binding legal judgments" (Alter, 2014, 68). Today's "new-style" international courts, furthermore, have expanded power and influence relative to ICs of decades past, as they enjoy compulsory jurisdiction and allow nonstate actors to bypass national governments by initiating litigation themselves (Alter, 2014). Scholars have devoted significant attention to understanding whether ICs are autonomous institutions that can shape state behavior through their rulings, or whether, instead, they are dependent upon and influenced by the states that created them. Findings on the extent of ICs' judicial independence are mixed. While some scholars find that rulings from the European and International Courts of Justice (ECJ and ICJ) are influenced by member state preferences and other political considerations (Carrubba, Gabel and Hankla, 2008; Garrett, Kelemen and Schulz, 1998; Larsson and Naurin, 2016; Posner and Yoo, 2005) others find that rulings from courts such as the ECJ and European Court of Human Rights (ECtHR) are largely autonomous from political influence (Alter, 1998, 2008; Sweet and Brunell, 2012; Voeten, 2008). The judicial independence of international courts, therefore, is an area of considerable scholarly debate, as well as an issue of policy importance given the proliferation of ICs, the increasingly prominent role ICs play in international politics, and the common belief that international courts are more effective if independent/autonomous.[5]

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[5]For an alternative view, see Posner and Yoo (2005), who argue that dependent international tribunals are actually more effective than independent tribunals at resolving interstate disputes.

This paper contributes to this debate in several ways. First, it moves beyond the European context, where most previous research is focused, and which some argue is not the ideal testing ground due to the unique level of integration of European states (Posner and Yoo, 2005). Second, whereas prior research on judicial autonomy primarily examines judicial rulings to determine if they are biased, we demonstrate that case selection is a key decision point at which ICs can act more or less autonomously. This has implications for our understanding of judicial independence at later stages of the process, furthermore, because an IC that is subject to political pressures at the case selection stage may choose to pursue (or not pursue) particular cases based upon political considerations. This suggests that cases that pass through procedural stages are likely a non-random sample, something that existing studies have tended not to explicitly model.[6]

This study, therefore, fills important gaps in research on the ICC specifically and international courts more generally, with implications for our understanding of the international judiciary's independence and the ICC's impact on international peace, justice, and deterrence. The next sections theoretically and empirically examine OTP decision-making with the aim of answering the most basic question about the functioning of the court: how does the OTP choose where it will act?

OTP Prosecutorial Discretion

In creating the ICC, states delegated to the Chief Prosecutor and her office (the OTP) significant authority and autonomy to select situations for examination and investiga-

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[6]Some studies include admissibility decisions as well as substantive rulings on the merits in their analyses (Carrubba, Gabel and Hankla, 2008; Voeten, 2008, e.g.,). They do not, however, account for the selection process that may affect later, substantive decisions. Pooling all decisions (admissibility and substantive) without accounting for this selection process obscures this potential source of bias.

tion (Danner, 2003; Schabas, 2011; Stahn, 2009).[7]. While the OTP's authority is not absolute,[8] her office has broad decision-making authority at two key stages: the first involves the decision to initiate a preliminary examination, and the second involves the decision to escalate to a formal investigation.[9]

The OTP can initiate preliminary examinations, or pre-investigation phase analyses, via three mechanisms: (1) referral by a state party, (2) referral by the UN Security Council, or (3) via its own proprio motu (Article 15) authority, which allows it to initiate examinations, independent of referral, based on communications received from states, NGOs, individuals, etc. (Schabas, 2011; Smeulers, Weerdesteijn and Hola, 2015). While jurisdiction is limited to crimes committed on the territory of or by nationals of state parties in situations initiated via mechanisms (1) and (3), this is not the case for situations referred through the UNSC. Furthermore, the OTP is not obligated to proceed with a preliminary examination when situations are referred by states or the UNSC; rather, the "Prosecutor maintains the discretion to determine whether it is appropriate to move forward with such a situation" (Smeulers, Weerdesteijn and Hola, 2015, 5).

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[7]IOs derive authority and independence through the delegation processes that states engage in when creating them, and through the expertise and specialization that they provide (Barnett and Finnemore, 1999; Barnett, Finnemore et al., 2004; Beardsley and Schmidt, 2012; Finnemore, 2009; Haftel and Thompson, 2006).

[8]Though rare, it is possible for the Pre-Trial Chamber to reject the OTP's request to proceed from a preliminary examination to a formal investigation. This happened in April 2019, for instance, when the Pre-Trial Chamber II rejected the OTP's request to begin a formal investigation into the situation in Afghanistan. However, this is the exception rather than the rule, so we treat the OTP as the central decision-maker theoretically, while acknowledging that her authority is not absolute.

[9]The OTP also plays a key role, once engaged in a formal investigation, in the decision to issue arrest warrants or summonses for individual suspects. We focus only on the former two decision points in this paper, but note that the logics proposed below likely also influence OTP decision-making at the latter stage.

Proprio motu authority, coupled with final authority on the decision to proceed even in referred cases, suggests that even at the preliminary examination stage, the OTP has considerable discretion and authority to decide whom to target.[10].

In accordance with Article 53 of the Rome Statute, the OTP assesses jurisdictional issues, admissibility (gravity and complementarity), and whether proceeding with an investigation serves the interests of justice during a preliminary examination (of the Prosecutor, 2013). If the OTP deems that there is a reasonable basis to proceed, the chief prosecutor can then advance the situation to a formal investigation. During a formal investigation, the OTP gathers evidence, identifies suspects, and requests ICC judges to issue arrest warrants or summonses for suspected perpetrators. As Bosco (2013, 8) notes, prosecutorial discretion is nearly absolute at this decision point: "the prosecutor and the judges have almost complete discretion as to which situations to investigate and which individuals to prosecute."

The Strategic Logic of Situation Selection and Advancement

Given that the OTP has wide prosecutorial discretion at these key decision points, it is imperative to understand the chief prosecutor's incentives and constraints in order to build a coherent theory of situation selection. Research on international courts suggests that high levels of delegation and discretion, such as that enjoyed by the OTP, promote judicial independence from political influence, ensuring that decisions made

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[10]Arguably, there are greater restrictions on OTP discretion and authority with regard to the decision to initiate preliminary examinations versus the decision to advance to formal investigation, particularly because there are fewer mechanisms by which the OTP can gain jurisdiction to initiate a preliminary examination targeting non-ratifiers of the Rome Statute. We account for the possibility that our results are sensitive to the inclusion of non-state parties in a secondary test focused only on ratifiers, finding that our results remain consistent

by these institutions are rooted in clear legal principles (Alter, 2008; Voeten, 2008). However, these existing arguments focus on international court *rulings*, not on the initial decision to investigate. Therefore, it remains an open question whether the vast discretion delegated to the OTP prevents or promotes political considerations in situation selection and advancement. While the Chief Prosecutor's decision-making is *legally* autonomous from member states and other international actors, that does not mean she is necessarily indifferent to or unaffected by such actors' preferences and interests.

We begin with two key assumptions. First, building upon insights from research on Supreme Court agenda setting and criminal prosecutors, we assume that the OTP behaves strategically when making decisions about whether to initiate preliminary examinations or advance situations to formal investigation.[11]. Second, and following from this, we assume that the chief prosecutor has incentives to maximize her office's anticipated effectiveness when it comes to situation selection and advancement.

An effective OTP is one that successfully advances situations through the various stages of the investigation process. The chief prosecutor is accountable to the Assembly of State Parties (ASP) and President of the ICC, and faces pressure from these bodies to demonstrate her office's effectiveness.[12] Schabas (2008), for example, notes that the slow pace of investigations and prosecutions by the OTP has created tension between the OTP and other organs of the court, including the ASP. More broadly, this relates

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[11]Like the OTP, both justices and prosecutors have tremendous autonomy when it comes to case selection, and research recognizes that both behave strategically when it comes to agenda setting. Justices engage in sophisticated voting and are influenced by both legal concerns and policy considerations (Black and Owens, 2009; Caldeira, Wright and Zorn, 1999; Perry, 2009), while prosecutors are influenced by strategic considerations from a desire to secure reelection to partisan loyalties (Gordon and Huber, 2009, 136)

[12]The ASP votes the Chief Prosecutor into office, and the ASP or the President can remove her from office or disqualify her from specific cases through a majority vote (Schabas, 2011, 379).

to research on IO legitimacy, which suggests that "IOs are often judged by what they accomplish, and …lack of effectiveness injures their legitimacy" (Barnett, Finnemore et al., 2004, 168). Thus, an OTP that continually fails to accomplish its objectives will be perceived by member states as ineffective and will, as a result, suffer legitimacy costs that might ultimately threaten the chief prosecutor's position and the ICC's viability more generally. As a result, the OTP faces pressure to advance situations through the various stages quickly and effectively, incentivizing the OTP to strategically select situations with an eye toward anticipated effectiveness.

Effectiveness, we argue, is a function of two key factors: (1) the OTP's perceived impartiality, or the extent to which it adheres to the legal standards established in the Rome Statute (Schabas, 2011) and (2) its adherence to powerful states' interests. As we discuss further below, impartiality contributes to effectiveness because member states are more likely to view the OTP's activities as legitimate, and therefore provide political and financial support to the institution, if the OTP adheres strictly to its mandate. Adherence to powerful states' interests, on the other hand, influences effectiveness because strong state support is often critical in securing the cooperation of governments and other actors in OTP examinations and investigations, thereby supplementing the OTP's weak enforcement capabilities. These two key sources of effectiveness suggest two possible strategic logics of situation selection. The first suggests that the OTP will select the gravest cases that domestic courts cannot or will not take on, as gravity and complementarity are the key Rome Statute principles guiding situation selection. The second suggests that the OTP will select situations that it believes will gain the backing of (or at least avoid obstruction by) powerful states.

Importantly, these two selection strategies are neither mutually exclusive, nor always fully compatible with one another. The OTP, therefore, faces a potential tradeoff; pursuing cases in line with powerful states' interests may improve the OTP's effective-

ness by making it more likely that the court gains the backing of key international actors to support its investigations, but doing so may also undermine the OTP's legitimacy by deepening the belief that the OTP lacks impartiality and is a pawn of powerful states. On the other hand, selecting situations based upon issues of gravity and complementarity may improve effectiveness by garnering greater support from member states and the ICC presidency, but may undermine the prosecutor's ability to effectively carry out examinations and investigations if the gravest cases are threatening to powerful states' interests and thus are not supported by key international actors. In the following sections, we discuss each of these selection strategies in more detail.

Situation Selection based on Impartiality

The OTP has strategic incentives to select situations based upon a principle of impartiality, or strict adherence to the legal mandate established in the Rome Statute, because impartiality may improve the OTP's ability to effectively carry out examinations and investigations. Neoliberal accounts of IO behavior suggest that state parties' support for the OTP should depend upon the extent to which the chief prosecutor adheres to the mission that member states have assigned to her, as legitimacy derives from following the mandate (Barnett and Finnemore, 1999; Beardsley and Schmidt, 2012; Finnemore, 2009). In practice, this has proved to be true: states that perceive the OTP's situation selections to be out of step with the institutional mandate have threatened to pull funding for the court or exit the ICC altogether. For example, a group of 11 states including some of the Court's biggest financial backers[13] launched an initiative in 2016 to restrict the Court's funding due, in part, to inefficiencies at the court and perceived biases in the OTP's activities (Evenson and O'Donohue, 2016). Impartiality is thus

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[13]The states include Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, UK and Venezuela.

important for maintaining member state support, which in turn, influences the OTP's effectiveness via funding and institutional legitimacy mechanisms.

If the OTP selects situations with impartiality in mind, then it should focus its activities on the worst human rights abuses in countries where domestic impunity is likely. More specifically, the OTP's admissibility assessment is governed by Article 17 of the Rome Statute, which established two key criteria to guide situation selection and advancement: gravity and complementarity.

With regard to gravity, the Rome Statute tasks the OTP with investigating and prosecuting individuals who have committed the "most serious crimes of concern to the international community as a whole" (Statute, 1998, 5,1). This criterion is written into Article 17(1)(d) of the Statute on admissibility, and allows the Court to declare a case inadmissible "when it is not of sufficient gravity to justify further action by the Court" (Schabas, 2011, 200). While the Statute is silent on exactly how gravity should be assessed, OTP policy papers indicate that this principle has been interpreted by examining both the nature and scale of the crimes involved (Smeulers, Weerdesteijn and Hola, 2015). Thus, if the chief prosecutor is driven primarily by strategic incentives to strictly adhere to her office's legal mandate, the OTP should focus on situations characterized by, and actors responsible for, the gravest human rights violations.

It is important to note that the OTP formally assesses admissibility as part of a preliminary examination, when deciding whether to advance to a formal investigation. This suggests gravity should certainly matter in the second stage, as the OTP assesses whether to escalate its involvement. At the same time, the OTP is likely to have already informally assessed the gravity of a given situation *before* initiating a preliminary examination. States, the UNSC, NGOs, and other actors often provide information to the court about gravity when they submit a referral to the OTP. For example, the UNSC claimed that crimes against humanity had taken place against the civilian population in Libya in

UNSCR 1970 (UNSC, 2011). Furthermore, the OTP monitors potentially violent situations around the world as they unfold, before a preliminary examination is initiated. For example, the OTP issued statements in May and November 2015 regarding the escalating tension and electoral violence in Burundi.(Bensouda, 2015). These statements were issued the year *before* the preliminary examination in Burundi began, indicating that the OTP was actively assessing gravity prior to the initial decision to get involved.

Thus, we expect that the OTP will engage in an informal assessment of gravity before initiating a preliminary examination, and will then carry out a more formal gravity assessment before advancing to a formal investigation. As a result, if the OTP prioritizes adherence to its legal mandate, the gravity of abuses perpetrated by a government or non-state actor will be a strong, positive predictor of advancement at both key decision points.

Furthermore, if the OTP prioritizes impartiality, its involvement should be directed specifically at the actor or actors responsible for human rights abuses, without consideration of the political ramifications of such targeting. That is, the OTP will initiate examinations and advance formal investigations against *the government* when it has perpetrated grave abuses of human rights, and will initiate and escalate investigations against *non-state actors (e.g. rebels or members of the opposition)* when such non-state actors are responsible for grave human rights violations. In other words, an OTP that acts primarily with impartiality in mind will not be swayed by the power of state agents to avoid investigation, but will instead initiate examinations and investigations that target the actor or actors most responsible for grave human rights violations, regardless of power politics considerations.

Hypothesis 1: As the gravity of human rights violations perpetrated by government (opposition) actors increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation targeting government (opposition) actors

increases.

The second aspect of the legal mandate that should influence OTP situation selection if the chief prosecutor follows a logic of impartiality centers on the Rome Statute's other key admissibility principle, complementarity. The ICC was conceived of as a 'court of last resort', meaning its jurisdiction extends only to situations in which domestic legal systems are unwilling or unable to effectively investigate or prosecute suspected violators of the law. That is, "The Court is intended to complement, not to replace, national systems. It can only prosecute if national systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely" (Bensouda, 2012). Article 17 of the Rome Statute mandates that the OTP assess complementarity when determining whether it has jurisdiction over particular situations, and that the OTP move forward only when domestic courts do not (Schabas, 2011).

Thus, if the OTP is driven primarily by strategic incentives to adhere to its legal mandate, it should evaluate the likelihood of effective, unbiased domestic prosecution before acting itself. The likelihood of unbiased domestic prosecution, we argue, is a function of the effectiveness or independence of the state's judicial system (Conrad and Ritter, 2013; Conrad, 2014; Conrad and Moore, 2010; Powell and Staton, 2009). States with independent judicial institutions can more easily investigate and try perpetrators of human rights violations, even if those perpetrators are high-ranking government officials, while in states without judicial independence, perpetrators can commit violations with domestic impunity.[14]

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[14]Of course, judicial independence is an imperfect proxy for domestic prosecution. Some states with strong and independent legal institutions may still fail to pursue justice against potential perpetrators. Nevertheless, we expect that, on average, perpetrators are more likely to be held accountable when states have effective domestic judiciaries.

As with gravity, assessing the presence and quality of domestic prosecutions is officially undertaken as part of an ongoing preliminary examination's phase 3 admissibility assessment. However, like gravity, we expect the OTP to have some baseline expectation about the likelihood of unbiased domestic prosecution before initiating a preliminary examination. This is because judicial independence is likely observable to the OTP before it decides whether to initiate a preliminary examination. It is also likely that actors who refer situations to the court via official communications or referrals provide information to the OTP regarding the presence or absence of domestic accountability processes surrounding reported abuses. For example, in Amnesty International's communications to the ICC over the situation in the Philippines, the NGO explicitly discussed the lack of domestic accountability (International, 2018). Therefore, it is likely that judicial independence affects not only the decision to initiate a preliminary examination, but also the decision to advance to a formal investigation.

Hypothesis 2: The OTP is less likely to initiate preliminary examinations or to advance situations to formal investigation against both governments and opposition actors when the relevant state has a more effective/independent judiciary.

Situation Selection Based on Powerful States' Interests

As noted above, the OTP also has strategic incentives to consider powerful states' interests when selecting situations for examination and investigation, as doing so may improve the OTP's ability to effectively carry out examinations and investigations. This is because the OTP's enforcement capabilities, as established in the Rome Statute, are limited. It has no standing army or police force to execute its warrants, and therefore relies upon the cooperation of states for enforcement (Goldsmith and Krasner, 2003; Prorok, 2017). This is a critical limitation because governments may be incapable of capturing and transferring wanted individuals themselves, or may lack the willingness

18

to turn over suspects, even if they have the capacity to do so. For example, Uganda has been unable to capture LRA leader Joseph Kony, while Ivory Coast has refused to turn over Simone Gbago (BBC, 2014*a*). Further, the OTP cannot effectively investigate without state support. In the preliminary examination stage, the OTP spends a considerable amount of time in a state to determine if it should move to a formal investigation. Once a formal investigation is underway, the OTP must collect the necessary evidence to prosecute potential perpetrators. In the Democratic Republic of Congo, for instance, the OTP conducted more than 70 missions, while in Uganda it completed nearly 50 missions in a 10 month period. During its visits to Uganda, the OTP relied on the Ugandan Armed Forces as escorts to travel throughout the country due the instability there. (Watch, 2008).

Given these limitations on enforcement and investigative capacity, combined with the need to prioritize effectiveness, the OTP is likely to strategically select situations for examination and investigation that align with, or at least do not threaten, powerful states' interests. Research suggests that a key determinant of IO effectiveness is whether the institution receives financial and political support from powerful states (Barnett, Finnemore et al., 2004, 168). Although there are several strong states in the system, we focus on the influence of the permanent five members of the UN Security Council (i.e. P5 states) for several reasons. First, the P5 are afforded special status with respect to the ICC by virtue of the UNSC referral and deferral mechanisms included in the Rome Statute. In addition to referring/blocking cases, the P5 and ultimately the UNSC can call on states to cooperate with the ICC, while it can also diplomatically condemn and/or impose sanctions on states for failing to work with the OTP. In other words, P5 states hold a privileged position in the current system that gives them the political and legal authority to coordinate the support (or opposition) of the international community to the OTP (Voeten, 2005). Finally, the P5, as some of the leading states in

the international system, are those most likely to have the economic, political, and military might to advance or undermine the OTP's efforts, independent of their positions on the UNSC.

The P5 can support the OTP directly, by acting as the Court's enforcers. The United States, for example, has provided military support to governments who are unable to enforce ICC warrants on their own, such as Uganda in its search for LRA leader Joseph Kony, and has turned over suspects to the Court, including fugitive warlord Bosco Ntaganda in April 2013 (Simons, 2013). The P5 can also support the OTP indirectly, by using a variety of carrots and sticks at their disposal to persuade third party states and non-state actors to support the ICC. The American Rewards for Justice Program, for example, provides payments of up to five million dollars to third parties for information that leads to the apprehension of fugitives in atrocities cases (Simons, 2013). Likewise, the UK used diplomatic tools such as a threatened travel ban and avoiding non-essential contact with Kenyan ICC indictees Uhuru Kenyatta and William Ruto to try to compel the suspects to cooperate with the court(Smith, 2013).

The P5 can also use their political influence to thwart the OTP; reports indicate that US, UK, and French diplomats exerted pressure on the Court and Palestinian groups not to open a Gaza war crimes inquiry (Borger, 2014; Post, 2014). Similarly, Russia and China vetoed a UNSC resolution in May 2014 that would have referred the situation in Syria to the Court (BBC, 2014*b*). Finally and most recently, American unwillingness to cooperate with the OTP's preliminary examination in Afghanistan thwarted the Court's efforts in that situation. The Pre-Trial Chamber's decision in April 2019 not to proceed with a formal investigation into the situation in Afghanistan was justified explicitly on effectiveness grounds. The Chamber's statement indicated that "the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful in-

vestigation and prosecution extremely limited."[15]

The above examples suggest that P5 states have significant power to influence the OTP's effectiveness. They can directly enforce ICC warrants when involved governments are unwilling or unable, and can use political pressure, financial incentives, or coercion to persuade governments and non-state actors to cooperate with OTP investigations. On the other hand, the P5 can also actively undermine OTP investigations by using political, financial, and military pressure to prevent third parties from cooperating with the OTP or directly blocking ICC involvement. Therefore, the support, or at least acquiescence, of the P5 is key to the OTP's ability to effectively carry out its mandate, despite the fact that three of the P5 – the United States, Russia, and China – are not state parties to the Rome Statute. As a result, the Chief Prosecutor has incentives to consider P5 interests when deciding whether to initiate a preliminary examination or formal investigation, and she may be deterred from doing so when P5 interests are threatened, out of fear of having her office's activities thwarted via P5 obstruction.

For their part, the P5 will prefer to avoid ICC examinations and investigations that target their own regimes or nationals, as well as those that target countries that they share close ties with. The incentives to avoid direct targeting by the OTP are straightforward: P5 states will guard domestic sovereignty norms strongly, wanting to retain full control over accountability processes involving their nationals, whether regime officials, military personnel, or domestic opponents. P5 states will also prefer to avoid OTP actions targeting countries they share close ties with. Examinations or investigations targeting friendly governments could directly threaten P5 geopolitical interests by weakening a friendly government's hold on power and thus the P5 state's political influence in that country. For example, Appel (2018) finds that governments are more

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[15]See (Kennedy, 2019).

likely to face domestic challenges that could threaten their survival following ICC activity in their states. Likewise, even if the targeted government maintains power, ICC involvement can be costly for governments during the examination/investigation stages, as OTP actions shine an international spotlight on targeted states, potentially leading other international organizations and states to impose economic sanctions (or other sticks) on them (Appel, 2018). Such international costs can further weaken targeted governments, which, in turn, threatens the interests of P5 states. [16].

Examinations and investigations targeting opponents of a government with close ties to the P5 are similarly likely to generate negative reactions from P5 states, despite the fact that in these cases the friendly government is not directly targeted. While it is possible that the P5 would acquiesce to the ICC targeting regime opponents in such cases, we believe that it is more reasonable to expect P5 states to prefer that the OTP avoid the situation entirely. This is because OTP involvement could limit the local regime's policy options, which indirectly threatens P5 interests. Additionally, an ICC inquiry could expand to include the government, which might then threaten P5 interests as discussed above. For instance, Luis Morenea Ocampo, the former Chief Prosecutor, discussed expanding the investigation in Uganda to include government actions in 2010, even though the OTP's initial involvement was solely directed against the LRA (Forum, 2010).

Taken together, this suggests that the P5, wanting to protect their foreign policy interests, will seek to block and/or impede OTP examinations and investigations at home and in states where they share close ties with the government, while being more willing to support OTP involvement in states that they share weak ties with. We expect this to

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[16] In addition, P5 states might incur their own reputational costs for supporting states that are being investigated by the ICC because they may be viewed as pariah states by the international community

hold for both preliminary examinations and formal investigations, as both generate domestic and/or foreign policy costs for the P5.[17] Given the OTP's incentives to prioritize effectiveness, this suggests that the chief prosecutor will avoid initiating examinations and investigations focused on P5 states or states with close ties to any of the P5.

Hypothesis 3: As the strength of P5 ties to a given state increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation targeting government or opposition actors in that state decreases.

Research Design

The empirical analyses presented below use the country-year as the unit of analysis. Our sample includes all countries that are independent members of the international system between July 2002, when the ICC became active, and the end of 2016. We include all country-years in our main analysis, rather than a restricted sample of countries, because the potential for ICC involvement is theoretically global: non-states parties can be referred by the UNSC (e.g. Libya), can adopt ICC jurisdiction voluntarily (e.g. Ukraine), or can fall under the court's jurisdiction as a result of military intervention on the territory of ratifier states (e.g. United States). However, recognizing that the probability of ICC involvement is likely substantially lower for countries with strong human rights records and no recent history of political violence, and that the pathways to ICC involvement for countries that are non-ratifiers of the Rome Statute are much more restricted, we present two additional analyses in the supplementary materials that restrict the sample to (1) countries that have experienced political terror (PTS) scores of 3 or higher or

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[17]It is important to acknowledge that the five P5 states have diverse interests around the world. We argue that opposition from any one of the P5 is enough to undermine the OTP's effectiveness. Therefore, the OTP is likely to consider the potential support of P5 states independently, and to be deterred when at least one P5 state's interests are threatened.

have experienced civil conflict since 2002, and (2) ICC ratifier states.[18]

Response Variables

The empirical analyses test the determinants of moving from no ICC involvement, to a preliminary examination, and then to a formal investigation, while also accounting for the target (government or opposition) of the ICC's involvement. Specifically, we examine two sequentially ordered dependent variables:

- State-Focused ICC Involvement

- Opposition-Focused ICC Involvement

To measure these variables, we need to determine what countries the ICC gets involved in and who, within those countries, the OTP targets in its examinations and investigations. Because the OTP examines and investigates *situations*, rather than countries or specific actors, determining who the OTP targets is non-trivial. To do this, we researched each situation that the OTP has examined or investigated since the ICC became active in 2002 (through 2016). For each situation, we first determined which country or countries were the focus of the OTP's activities. We considered a particular country to be under examination/investigation if actions taken by officials or nationals of that country were *explicitly* being examined or investigated by the ICC. Evidence of explicit examination or investigation includes explicit references to the behavior of or crimes potentially committed by government/nationals of that country in ICC reports and documentation. We examined a variety of documents from the ICC, including press

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[18]One alternative would be to restrict the sample to the set of situations that have been referred to the OTP through communications from states, international organizations, non-governmental organizations, and individuals. The OTP does not make details on communications publicly available, however, so it is not possible to build a sample for analysis based upon actual communications to the court.

releases on the opening of examinations/investigations, annual reports on the Court's activities, summary reports for ongoing cases, etc. Importantly, our coding rules mean that the state associated with a particular "situation" in the ICC's documentation is not necessarily the state, or the only state, experiencing ICC involvement. For example, the situation referred to the ICC by Comoros, Greece, and Cambodia does not involve an investigation of actions taken by these states or their nationals, but instead is focused on potential abuses committed by the Israeli government. We therefore treat Israel as the target of ICC involvement, while excluding Comoros, Greece, and Cambodia as ICC targets. Additionally, in the court's preliminary examination focused on Afghanistan, both Afghanistan and the United States are implicated. This is because reports provided by the ICC on it's preliminary examination activities explicitly refer to potential abuses perpetrated by Afghan forces and nationals, as well as to potential abuses committed by US forces in Afghanistan. Thus, ICC involvement is coded for both Afghanistan and the United States.

After identifying which states have been targeted by OTP examinations and investigations, we then determined whether the OTP targeted government and/or opposition actors in each of the target countries. We consider the ICC's actions to be government-targeting if they involve examining/investigating actions taken by current members of the state's security forces or current political leaders. We also consider actions to be state-targeting if the Court investigates alleged crimes committed by supporters of or groups supported by the current regime.[19] We consider the OTP's actions to be opposition-targeting if they focus on current rebel group members, political op-

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[19]For example, this includes crimes allegedly committed on behalf of Kenyan government officials by private citizens (i.e. lawyers engaging in witness tampering on their behalf). This would also include crimes allegedly committed by pro-government militia groups that receive state backing.

ponents of the current regime, or any other actors who are not considered state tar-gets. In several cases, both state and opposition figures are implicated in the OPT's investigations. In these cases, both state-focused and opposition-focused OTP inves-tigations are recorded in our data. For example, according to court documents, the OTP's preliminary examination into the situation in Colombia explicitly focuses on ac-tions taken by rebel organizations (i.e. FARC and ELN), pro-government paramilitaries, and the state's own security forces. Therefore, both *State-Focused ICC Involvement* and *Opposition-Focused ICC Involvement* are coded 1 from 2004, when the examination be-gan, through 2016, as both state officials/agents and members of opposition groups are potentially implicated.

After identifying which government and non-state actors have been the focus of ICC involvement, we code the level of ICC involvement targeting those actors in any given year. Our resulting dependent variables, *State- and Opposition-Focused ICC Involvement*, measure the level of ICC involvement in a given year on a scale from 0 to 2. For both variables, we code the highest level of ICC involvement reached in any given year that is focused on a current member or supporter of the government (state-focused) or oppo-sition (opposition-focused). The levels of ICC involvement are as follows: 0 if there is no ICC involvement, 1 if the highest level of ICC involvement in the current year is a prelim-inary examination (proprio motu authority cases) or pre-investigation phase (state and UNSC referral cases), and 2 for years in which a formal investigation is ongoing. This last category includes cases that have progressed to the issuing of warrants or sum-mons and ongoing trials).[20] For example, Sudan is coded as having no ICC involvement prior to March 2005. From March 2005 through May 2005, ICC involvement is coded

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[20]We do not distinguish between stages after a formal investigation because of the small number of cases that have advanced to that point.

1, as the UNSC had referred the case to the ICC and the OTP was engaged in a pre-investigation phase analysis of information. From June 2005 through December 2016, Sudan receives a coding of 2 for both state- and opposition-focused ICC involvement, as a formal investigation targeting both government and opposition figures was ongoing. Figure 1 below provides an easy visualization of the highest level of state-focused and opposition-focused ICC involvement reached for each country between 2002 and 2016.

It is important to note that ICC involvement proceeds through these stages sequentially. That is, cases always begin with no ICC involvement, and the OTP always then engages in a preliminary or pre-investigation examination before reaching the formal investigation stage. As we discuss in more detail below, traditional ordinal regression approaches are inappropriate given the sequential nature of our DV, and we therefore introduce an approach that accounts for transitions between the sequentially ordered stages. It is also important to note that our dependent variables are coded based upon the status of those being investigated in any given year. This means that the level of state or opposition-focused ICC involvement may change if the status of those under investigation changes. This can occur, for example, if a regime change occurs in which targeted government officials lose power or targeted opposition members come to power.[21]

Based upon the above coding rules, *State-Focused ICC Involvement* is coded 0 in 2,786 observations (96%), 1 in 90 observations (3%), and 2 in 30 observations (1%). *Rebel-*

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[21]For example, the ICC investigation into the situation in Libya began as a state-focused investigation, as the OTP's efforts were focused on current state officials - Gaddafi and members of his inner circle. This changed, however, in September 2011, when the Gaddafi regime fell and former regime opponents took power. At that point, we code the ICC's involvement as opposition-focused. In this and one other case where similar side-switching occurs (DRC), we restrict the ICC involvement coding to 1 in the first year after the switch to avoid violating model assumptions.

Focused ICC Involvement is coded 0 in 2,775 observations (95%), 1 in 66 observations (2%), and 2 in 65 observations (2%).

State-Focused ICC Transitions through 2016

Opposition-Focused ICC Transitions through 2016

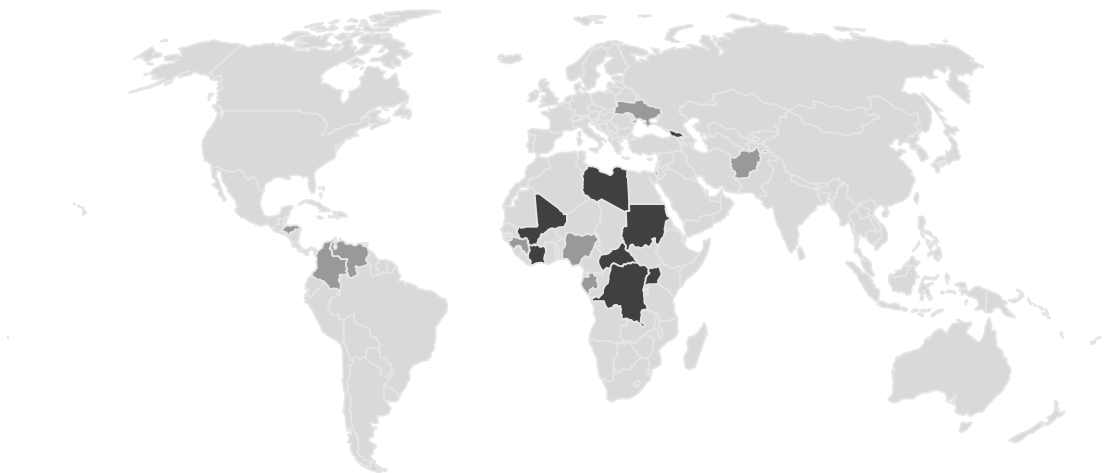|		
No ICC Investigation	Reached Preliminary Stage	Reached Formal Stage
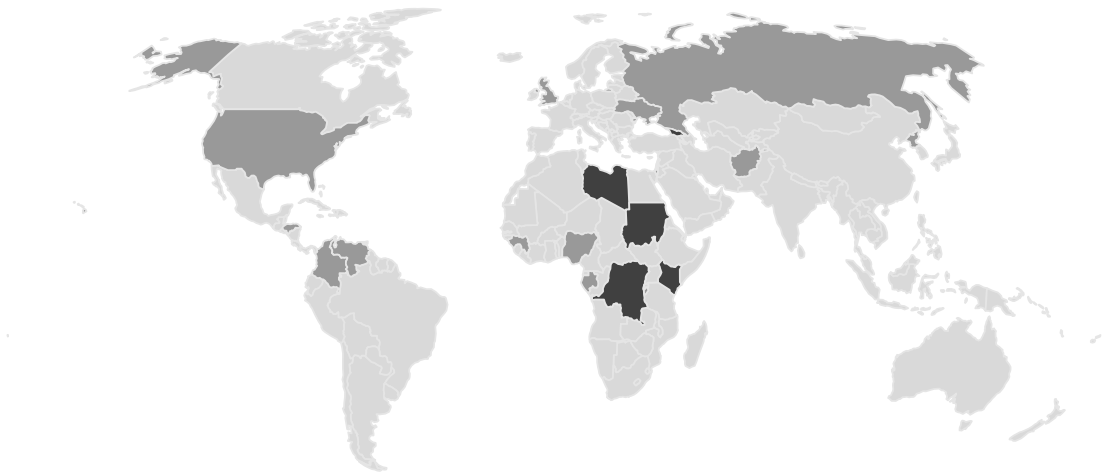
Figure 1: Caption

Impartiality Variables

To test the expectation that concerns over impartiality will drive the OTP's target selection, we include variables that capture the gravity of human rights abuses and the likelihood of effective domestic accountability. First, we use the Uppsala Conflict Data Program's (UCDP) Georeferenced Event Dataset (GED) to identify the number of civilians killed by government and opposition groups in any given year (Sundberg and Melander, 2013). The GED is an events dataset that includes information on all instances of intentional civilian targeting, or One Sided Violence (OSV), perpetrated by governments and nongovernmental actors since 1989. It is important to acknowledge that the GED data capture only OSV, and therefore do not encompass all types of violations of international humanitarian law (IHL) that might fall within the ICC's jurisdiction. Despite this limitation, intentional civilian killing is an appropriate measure because the extrajudicial killing of noncombatants is expressly prohibited by IHL (Blank and Noone, 2018).

Further, these data are ideally suited for this study because they enjoy several advantages over potential alternative measures. First, they are available through 2016, whereas many other existing datasets that capture broader human rights practices end earlier, which would force us to shorten our analysis timeframe and ignore important cases of ICC involvement. Second, these data allow us to identify the perpetrators of human rights violations. Other possible datasets such as PTS and CIRI provide only a single country-level 'score', which identifies the level of human rights violations in a given country. They do not allow us to identify violations perpetrated by non-state actors, as the scores generally refer to state-based abuses only. This is critically important, given that ICC action is often directed at specific non-state or opposition actors, not at the state itself, and hypothesis 1 predicts that the identity of the perpetrator of human rights violations matters for who the OTP targets. Finally, the OSV data provided by GED provides several advantages over alternatives because it is measured at the event-level.

It can therefore be easily aggregated to generate a measure of the magnitude of OSV perpetrated by government or non-state actors in a given year.

To measure government OSV, we first generate the sum of all civilians killed in one-sided violence events perpetrated by each government in a particular year based upon the raw events data from GED.[22] We then generate a running sum of the number of civilians killed in government-perpetrated OSV since July 2002 through the current year. This running sum provides a measure of the magnitude of human rights violations perpetrated by the state since the ICC became active. It is important to use this running sum rather than a simple measure of deaths in the current year because the OTP can decide to investigate instances of war crimes or crimes against humanity that occurred any time since a state came under its jurisdiction or since the court became active (if referred by the UNSC or the state itself), and because OTP examinations/investigations are generally retroactive rather than simply reflecting current violations.[23] In our analysis predicting State-Focused ICC Involvement, we include the natural log of the running sum of state-perpetrated OSV since July 2002, and lag this value one year. This variable ranges from 0 to 8.69, with a mean of 0.979. Finally, we allow the effect of this variable to vary across values of the DV, rather than forcing its effect to be stable when predicting the onset of an examination and the transition to a formal investigation.

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[22]The GED does not include data for Syria, but otherwise has global coverage. We therefore include data from UCDP's One-Sided Violence dataset (Eck and Hultman, 2007) for Syria, which allows us to include Syria, a potentially important case, in our analysis. Our results remain consistent if we exclude Syria from the analysis.

[23]An alternative would be to create a running sum of OSV perpetrated since the state became a ratifier of the Rome Statute. However, this would not allow us to include states that have not ratified the Rome Statute, and would ignore the fact that states can come under investigation by the ICC for crimes committed despite non-ratification if they are referred by the UNSC, are a non-state party who accepts the Court's jurisdiction on an ad hoc basis, or commit crimes on the territory of a ratifier state.

Measuring opposition-perpetrated OSV required us to first identify the set of relevant actors within each country. Because rebel groups, terrorists, and other non-state perpetrators of OSV can cross international borders and engage in civilian targeting in more than one state, we could not simply associate each non-state OSV perpetrator in the GED dataset with a single state. Instead, we used information provided by GED on the *location* of each OSV event to determine on which country's territory the event took place. This is important because the location of OSV is relevant for determining jurisdictional issues, as OSV perpetrated on the territory of a state party to the Rome Statute falls within the OTP's jurisdiction, and that perpetrated on the territory of a non-state party may not. Once we identified all OSV events perpetrated by non-state actors on the territory of a given state in a given year, we summed the resultant deaths to create a yearly total of civilians killed by non-state actors in that country-year. We then generated a running sum of the number of civilians killed in opposition-perpetrated OSV since July 2002 through the current year, analogous to the measure used for state-perpetrated OSV. In our models predicting Opposition-Focused ICC Involvement, we include the natural log of the running sum of opposition-perpetrated OSV since July 2002, lagged one year. This variable ranges from 0 to 9.41 with a mean of 1.19. Again, we allow this variable's effect to vary across values of the DV.

Finally, to proxy the likelihood that a state is willing and able to hold perpetrators accountable via domestic judicial processes (H2), we include a measure of judicial independence from the Varieties of Democracy (V-Dem) project (Coppedge et al., 2018). Domestic judicial independence is a useful proxy for complementarity because it captures the likelihood that domestic judiciaries are willing and able to investigate alleged perpetrators of war crimes and crimes against humanity. States with strong, independent judiciaries have the capacity to investigate perpetrators, while those with weak, non-independent judiciaries cannot credibly threaten an independent, effective inves-

tigation or trial. This holds for investigations that target both the state and opposition: a non-independent judiciary will be unable to hold state officials accountable because the judiciary is dependent upon those state officials. Similarly, a non-independent or weak judiciary will be unable to carry out an effective, unbiased investigation of opposition perpetrators either because of state interference or lack of resources and enforcement power. States with strong judiciaries, therefore, make both state-focused and opposition-focused ICC involvement less necessary. It is important to note that while this is a useful proxy for complementary domestic accountability, it is an imperfect one. Judicial independence should increase the likelihood of impartial, effective domestic judicial processes, but does not automatically mean that domestic courts will hold perpetrators accountable. Lacking more precise measures of complementarity for the time period under examination, we use judicial independence to proxy our concept of interest.[24] Specifically, we include a measure of lower court judicial independence from V-Dem (Coppedge et al., 2018). We prefer V-Dem's lower court rather than high court independence measure because lower courts are the predominant location for domestic human rights prosecutions. Descriptive data available from the Transitional Justice Research Collaborative website, for example, indicates that over 80% of domestic human rights trials between 2002 and 2010, for which court information was available, involved lower courts.[25] Higher values of this measure indicate greater independence of a state's

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[24]Importantly, judicial independence does positively correlate with human rights trials in available data: we regress human rights trials on our measure of judicial independence while controlling for regime-type, physical integrity violations, one-sided violence, regional prosecutions, and a lagged response variable. Data on trials and controls come from Dancy et al. (2019). We find that judicial independence is a significant predictor of trials, which supports our claim that judicial independence is related to domestic accountability. We cannot use the actual trials data in our analysis because it is available only through 2010 and only for post-transition countries, which would limit our sample significantly.

[25]Information available at: https://www.transitionaljusticedata.com/.

judiciary.[26] This variable is lagged one year because it is measured at the yearly level, and ranges from -3.19 to 3.43 with a mean of 0.346. We also model this variable to allow differential effects on the transition between stages of the ICC process.

Powerful States' Interests Variables

To test the expectation that concerns over powerful states' interests will drive the OTP's target selection, we include two variables that capture the closeness of potential target countries to the P5: foreign policy ideal point distance and an Africa dummy. First, we generate a measure of foreign policy preference similarity between a given state and the P5 using data on countries' foreign policy ideal points from Bailey, Strezhnev and Voeten (2017). For each state in our dataset, we measure the absolute value of the distance between that state's ideal point and each of the P5's ideal points. We retain the minimum of the five values generated as our measure of that country's minimum ideal point distance to the P5. In other words, this variable captures each country's ideal point distance from the closest of the P5 states. Higher values indicate greater distance, or greater policy preference dis-similarity, while lower values indicate increasing closeness. Each of the P5 is assigned a value of zero, as each P5 state's minimum ideal point distance to itself is always zero. This allows us to capture the fact that P5 states are most likely to want to avoid ICC examinations and investigations of their own behavior, above and beyond their desire to avoid ICC targeting of countries with which they share close ties. The resulting measure, therefore, is inversely related to P5 closeness: as minimum ideal point distance increases, the state in question gets farther and far-

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[26]The specific question asked in the V-Dem survey is: "When judges not on the high court are ruling in cases that are salient to the government, how often would you say that their decisions merely reflect government wishes regardless of their sincere view of the legal record?". The surveys asks this question of respondents on an ordinal scale (0-4) and then combines responses using a measurement model.

ther from the P5 in terms of policy similarity. Our theoretical expectation is that as this distance increases, the P5 have less of a vested interest in the internal politics of that state, P5 interests will therefore be less threatened by ICC involvement, and the likelihood of ICC examinations and investigations increases. This measure is lagged 1 year, as it is measured at the yearly level. It ranges between 0 (coded for each of the P5) and 1.37, with a mean of 0.307. We model this variable to allow differential effects across the preliminary examination and formal investigation stages of ICC involvement.

Second, we include a binary variable to account for whether the state is in Africa. This variable is a useful proxy for P5 interests, given that some argue that the OTP disproportionately targets African states because they lack strong links with major powers that can shield them from the Court (Arieff et al., 2010; Hoile, 2014; Rudolph, 2017). Indeed, as Arieff et al. (2010, 26) argue, "some commentators allege that the Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy." We thus see a clear link between the Africa bias discussed above, and powerful states' interests, and expect that if P5 geopolitical interests are driving OTP decision-making, the ICC will be more likely to target African governments and non-state actors at both the preliminary examination and formal investigation stages. This variable equals 1 if the country is on the African continent, and zero otherwise. It is coded one in 9,288 of 33,706 observations (28%). To get a more nuanced understanding of the Africa bias, we model this variable by allowing differential effects across stages of ICC involvement.

It is important to acknowledge that these two variables are relatively blunt proxies for P5 interests in a given country. Arguably, there are other ways we might conceptualize and measure ties to P5 states, such as alliance ties or P5 military intervention. These alternatives are limited in several ways, however, that make them unsuitable for use in our analyses. First, data on P5 military interventions are not available for most of the

time period covered by our analysis, so cannot be included (e.g. the International Military Interventions data (Pickering and Kisangani, 2009) are available only through 2005). Alliance ties data are available for more of our time period, but provide a largely static measures that is unable to account for dynamic relationships with P5 states. Specifically, once states form alliances, they tend to remain allies for a significant period of time (Leeds and Savun, 2007). Measuring P5 interests via alliance ties, therefore, would mask changes in P5 closeness that do not rise to the level of forming or abrogating alliance ties, and would thus provide only a blunt measure of cross-sectional variation. A similar limitation applies to trade agreements data, another potential measure of P5 interests. We therefore focus on the above two variables. The UNGA voting data that is used to create the ideal point distance measure is better able to capture less drastic, yet still important, temporal and cross-sectional variation in countries' ties to the P5. And while Africa is a static measure that captures only cross-sectional variation, it is valuable in that it both captures P5 interests, broadly speaking, and also allows us to directly speak to the claims of Africa bias leveled against the ICC.

Control Variables

We also include several potential confounders as control variables in the analysis. First, we control for whether the state in question ratified the Rome Statute. Ratifying the Rome Statute gives the ICC jurisdiction over the state in question and its nationals, so is likely to increase the chances of ICC involvement.[27] Ratification may also be correlated with key variables of interest, particularly our measure of human rights violations, if states use ratification as a signal to demonstrate their commitment to peace (Simmons and Danner, 2010). ICC Ratification is a binary variable coded 1 in the year a

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[27]As noted above, ratification is not a prerequisite for ICC involvement, but is still likely to increase its likelihood.

state ratified the Rome Statute, and in all subsequent years. This variable is coded 1 in 19,028 observations (56%). Data were obtained from the ICC website.[28]

Second, we include a dummy variable to account for whether there is an ongoing civil conflict in the state, using the UCDP Armed Conflict Dataset (Themnér and Wallensteen, 2012). We expect ICC involvement to be more likely if a civil war is ongoing. While the ICC is not responsible for prosecuting conflict per say, it is likely that the prevalence of conflict is correlated with war crimes. Further, civil conflict may be related to several of our key IVs, as conflict settings may be more likely to experience OSV, to be associated with low judicial independence and P5 affinity, and occur more frequently in Africa. This variable is lagged one year, and is coded 1 in 4,356 observations (13%).

Third, we include polity2 scores as a measure of regime type (Marshall and Jaggers, 2018). We expect the ICC to be less likely to become involved in situations in more democratic states, as these states likely have the resources and willingness to address human rights violations directly by holding human rights trials domestically (Kim and Sikkink, 2010; Herz, 1982), and are also likely to have better human rights records to begin with (Davenport and Armstrong II, 2004; Davenport, 2007). At the same time, better human rights records and more trials (i.e. complementarity) are likely to deter ICC involvement. Models include the full polity scale ranging from 1 to 21, with a mean of 15.3 in our sample. This measure is lagged one year.

Finally, we also include a measure of economic development in the models, operationalized as the natural log of GDP per capita (2010 constant US dollars) from the Bank (2018). Economic development may have differential effects on both our theoretical variables of interest and our response variables. Wealthier countries with higher levels of infrastructure (e.g. roads) and bureaucracy may be more attractive places for the

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[28]http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx

OTP to become involved because she can expect to be more effective in situations with relatively easier and greater access. In contrast, it is possible that developed states with greater political and legal resources may be able to deter ICC involvement. At the same time, economic development is related to the human rights practices of states (Hill and Jones, 2014) and human rights prosecutions Kim (2012), and is positively correlated with P5 interests and strongly negatively correlated with our Africa dummy. Therefore, while there are different pathways for the impact of GDP, is is nonetheless an important variable to include in the models due to its relationship with several important independent variables and ICC involvement. This variable ranges from 5.27 to 11.88, with a mean of 8.43. It is lagged on year in the analyses.

For each of these controls, we estimate a single, global coefficient, rather than stage specific effects across categories of our dependent variables. We do this because we do not have strong theoretical expectations that the effects of these variables should vary across stages. Further, because of the sparse nature of our dependent variables, particularly at the second stage, we simply do not have enough data for the model to ascertain well-behaved results when estimating stage-specific coefficients for all variables. Setting stronger priors could help address this issue, but we prefer to err on the side of conservative priors and stage-specific coefficients only for theoretical variables of interest.

Missing data

For many of the variables discussed above we have at least some proportion of missing observations. Polity scores are missing in 16% of our sample, GDP per capita values in 4%, judicial independence in 11%, and our P5 minimum ideal point scores in 2%. Simply, employing listwise deletion leads to us dropping about 20% of the cases from our dataset. This may not be especially concerning in general but in our case it leads to

notable changes in the distribution of our dependent varibales. For the *State-Focused ICC Involvement* dependent variable, we lose over 14% of our preliminary investigation country-year observations and for *Rebel-Focused ICC Involvement* we lose over 24%. As noted in Honaker and King (2010), simply employing listwise deletion can lead to inferential issues so employ a multiple imputation scheme. Specifically, we use a Bayesian multiple imputation scheme developed by Hoff (2007) and that has been shown to have equivalent or better performance to alternatives such as `mice` and `Amelia` by Hollenbach et al. (2018). This approach enables us to generate a posterior of imputed datasets that we use in our modeling framework to deal with listwise deletion and account for uncertainty from the imputation process itself. We further detail how we use this posterior of imputed datasets in the next section.

Modeling sequential processes

Our dependent variables, *State- and Opposition-Focused ICC Transition*, are both ordinal outcomes that can take values of: 1 = no involvement; 2 = preliminary investigation; and 3 = formal investigation. Typically, to model such an outcome we would employ a cumulative ordinal approach in which we partition the data into $K - 1$ sequential subsets such that we examine no involvement cases against all the above and no involvement and preliminary against formal.[29] This set of comparisons would be operationalized via a set of binary, cutpoint equations, where a 1 is defined as being at or below the kth cutpoint and a 0 otherwise.

In our set of ordinal outcomes, however, the ordered categories represent a progression through different stages, and to reach a later stage a country must pass through each of the previous stages. A cumulative ordinal approach here where the sample

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[29] K here represents the total number of categories.

does not change across the cutpoint equations poses an inferential issue as the set of binary equations are no longer independent (Tutz, 1990; Have and Uttal, 1994; Fienberg, 2007; Agresti, 2010).[30] Specifically, in the cumulative approach, we are modeling the probability of falling into any given category. Whereas in the approach we utilize here – referred to as a continuation ratio model – conditional splits are created in the data such that the likelihood of falling into a given category is defined as the probability of being in a category given that a country has progressed to that stage.

In the continuation ratio framework, we start with the idea that there is a latent continuous variable $\widetilde{Y}$ determining the transition between the kth and the $k+1^{st}$ category. $\tilde{Y}_k$ here represents all the factors contributing to the probability of a country proceeding beyond a given ICC investigation stage, k. To model how observations get categorized, we assume that there are $K-1$ thresholds, τ_k, that partition $\widetilde{Y}$ into observable ordered categories of Y. Setting up the problem in this way enables us to split the dependent variable into a set of $K-1$ logit equations corresponding to, in our case, the different phases of ICC involvement Tutz (1990); Agresti (2010).[31] We formulate this model as follows (Feinberg, 1980; Agresti, 2002; Fullerton, 2009):

$$\left\{ Log \left(\frac{P(y_{jt}=k|\mu_{jt})}{P(y_{jt}>k|\mu_{jt})} \right) = \tau_k - \mu_{jt} \quad (1 \leq k < K), \right.$$

where the j subscript denotes a particular country-ICC case,[32] t the year, k is a cate-

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[30]In the appendix, we compare the parameter estimates and performance of our approach with a standard ordinal framework. We show that not only do results substantively differ between the two approaches but that the ordinal framework is less accurate in terms of reflecting the data generating process underlying ICC investigations.

[31]If we were to apply a clog-log link, the structure here would be analogous to the discrete time version of the proportional hazard model; where the interest is in identifying the factors that predict survival to subsequent time intervals of the dependent variable.

[32]For every country-year, we determine the maximum of their ICC case status for the respective de-

gory, τ_k a threshold parameter, and μ_{jt} represents the set of parameters that go into the linear predictor of our model. In a model in which there are no parameters in μ_{jt} (i.e., a null model), τ_k denotes the log odds of being in category k or lower versus a higher catgory. The probability of an observation falling into a particular outcome category is:

$$P(y_{jt} = k | X_{jt}, W_{jt}, \alpha_j) = \begin{cases} F(\tau_k - (X_{jt}\beta + W_{jt}\eta_k + \alpha_j)) & k = 1, \\ \{\prod_{k=1}^{K-1}[1 - F(\tau_k - (X_{jt}\beta + W_{jt}\eta_k + \alpha_j)\}\times \\ \qquad F(\tau_k - (X_{jt}\beta + W_{jt}\eta_k + \alpha_j)) & 1 < k \leq K-1, \\ \prod_{k=1}^{K-1}[1 - F(\tau_k - (X_{jt}\beta + W_{jt}\eta_k + \alpha_j)] & k = K, \end{cases}$$

where F denotes the logistic CDF and $\mu_{jt} = X_{jt}\beta + W_{jt}\eta_k + \alpha_j$. We incorporate predictor variables into μ_{jt} in two ways, first we include a set of variables whose effect is consistent across the phases of ICC involvement. We denote these as X and their effect is measured by a vector of logit coefficients β. Second, we include predictor variables, W, whose coefficients, η_k, are allowed to vary across stages. The inclusion of category specific effects into this framework gives us what is referred to as the partial continuation ratio (PCR) model. Including this second set of category specific predictor variables allows for the possiblity that at different phases of the ICC process certain factors may matter more than others.[33] Last, to account for dependence between particular country-ICC case observations, we include a set of random intercepts into the

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pendent variable – State- or Opposition-Focused ICC Transition.

[33]This is simply a relaxation of the proportional odds assumption (Peterson and Harrell Jr., 1990). In the appendix we show that including category specific variables leads to substantively different results and better model performance.

linear predictor, denoted by α_j.[34]

We fit our model using the Hamiltonian Monte Carlo No-U-Turn Sampler in the `Stan` software package (Carpenter et al., 2017). We set weakly informative priors for each of the parameters ($\beta, \eta, \alpha,$ and τ) – further details of the exact prior paramterization is provided in the appendix. We modify the sampler with respect to its accommodation of missing data. Specifically, we embed results from the semiparametric copula imputation scheme described in the previous section within the sampler such that at each iteration of the MCMC sampler for the regression a randomly sampled imputed dataset from our posterior of multiple imputed datasets is supplied. The imputation scheme is described in more detail in (Hollenbach et al., 2018), but for our purposes the main reason for including it within the sampler is so that the resulting parameters from the regression MCMC take into account both uncertainty within the model and the imputation process itself.[35] We run the sampler for both the *State- and Opposition-Focused ICC Transition* models for 8000 iterations and use the first half as burn-in thus leaving us with 4000 posterior samples each.[36]

Empirical Results

Figure 2 presents results posterior distribution results for the transition to a *government-targeted* preliminary examination and formal investigation. Figure 3 presents posterior distribution results for *opposition-targeted* preliminary examinations and formal investi-

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[34]Incorporating random effects into the linear predictor of these types of models has been discussed previously in Have and Uttal (1994); Tutz and Hennevogl (1996); Dos Santos and Berridge (2000); Hartzel, Agresti and Caffo (2001).

[35]In the appendix, we show that results when using imputed data and listwise deletion are similar.

[36]Trace plots showing that the model converges towards a posterior quite quickly, even with the small number of iterations, are provided in the appendix. Additionally, there was little evidence of autocorrelation so we did not thin the samples drawn from the sampler.
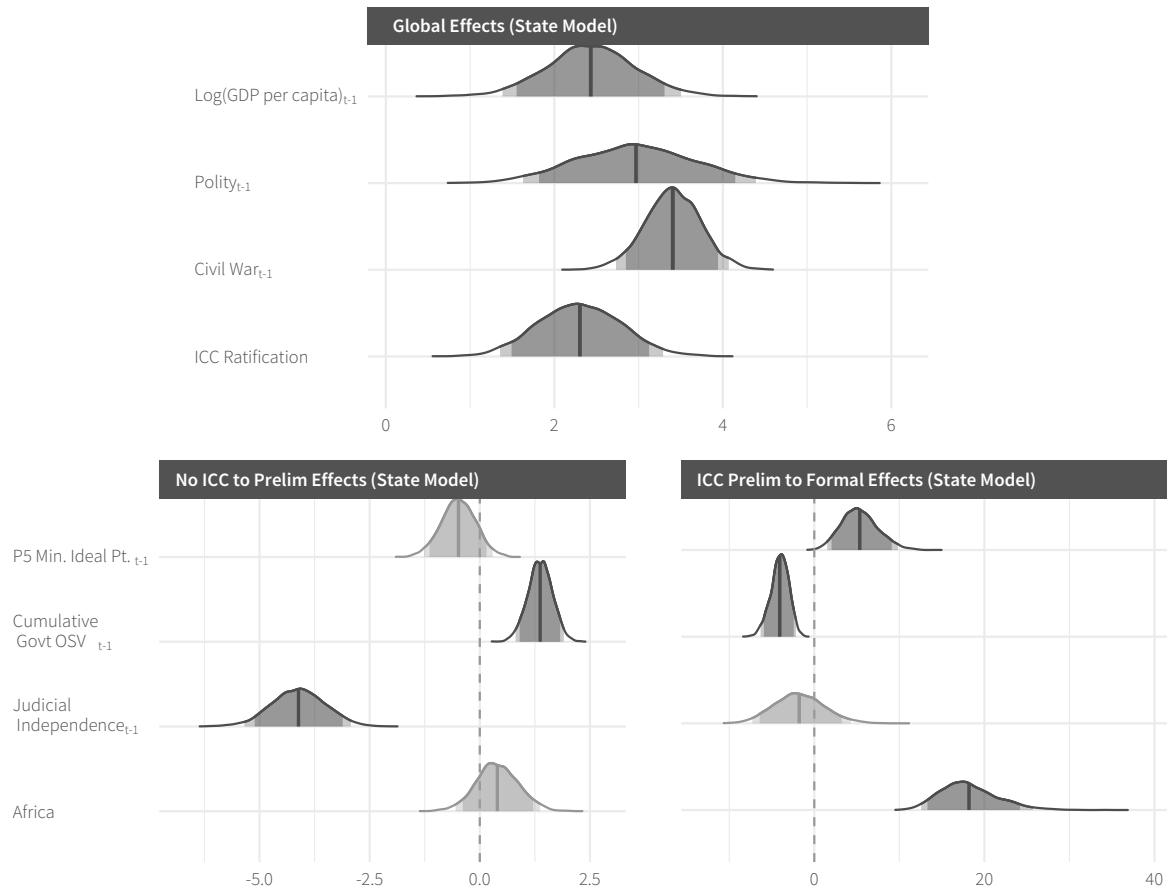
Figure 2: Parameter estimates from State-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 95% credible interval, and darker shaded portion the 90% credible interval.
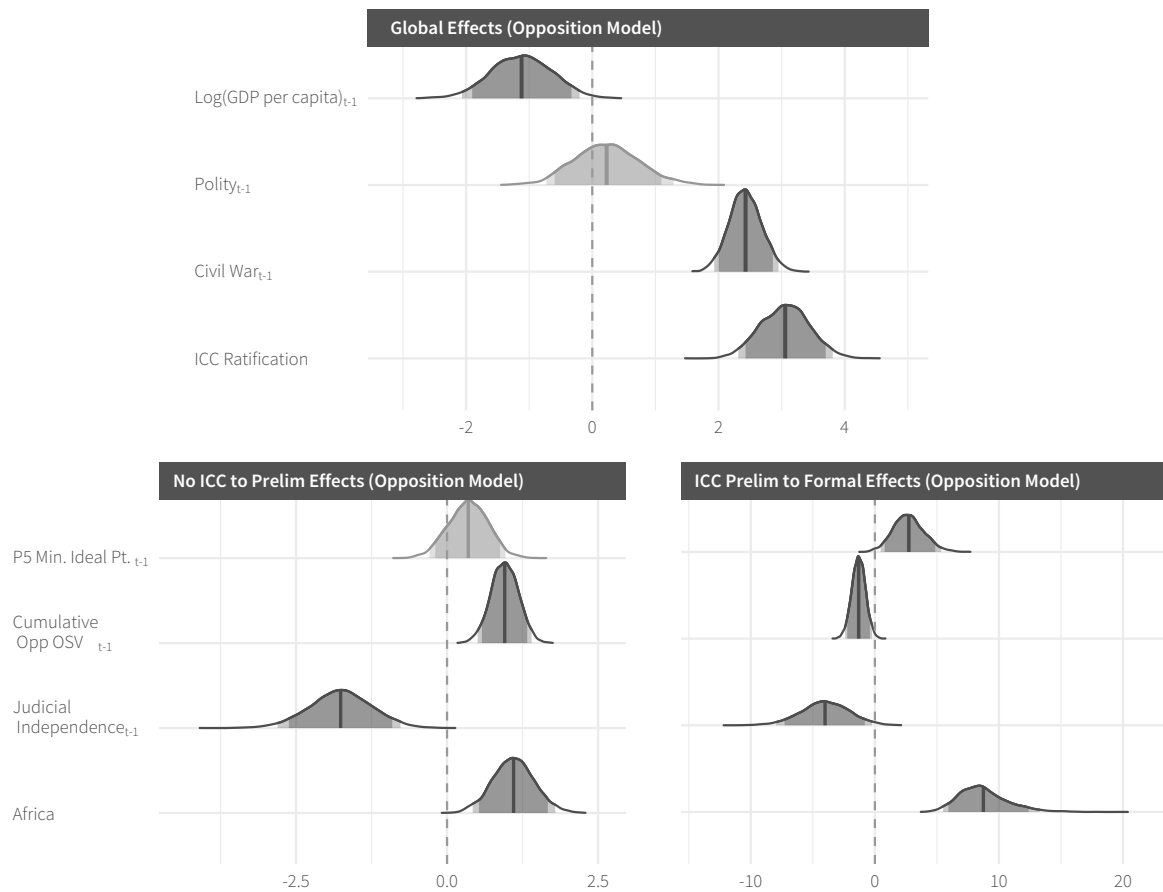
Figure 3: Parameter estimates from Opposition-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 90% credible interval, and darker shaded portion the 90% credible interval.

gations. Parameter estimates here represent standardized coefficients and the effects can be interpreted as how many standard deviations a dependent variable will change given a standard deviation change in an independent variable.[37] Lightly shaded portion of each of the distributions above designates the range of the 95% credible interval and the darker the 90%.

Based on the logic of impartiality, we hypothesized that the OTP would be more likely to initiate a preliminary examination and advance to a formal investigation targeting a particular government when that government perpetrated more civilian targeting (H1), and that the OTP would be less likely to initiate examinations or advance to investigations against governments with more independent judiciaries (H2). The results in Figure 2 demonstrate that the decision to initiate a preliminary examination (i.e. move from no ICC involvement to a preliminary examination) clearly follows the logic of impartiality. In line with H1, as the severity of government one-sided violence increases, the likelihood of the onset of a preliminary examination targeting that government also increases. More substantively, the coefficient estimate for the OSV variable is 1.37, indicating that a one standard deviation increase in one-sided violence is associated with a 1.37 increase in the likelihood that the OTP initiates a preliminary examination against the government.

Similarly, in support of H2, increasing judicial independence reduces the likelihood that the OTP initiates a preliminary examination against the government. Thus, when considering the decision to initiate the first stage of ICC involvement against the government, the OTP's strategic decision-making does appear to be informed by the logic of impartiality. Interesting, the results suggest that this variable has a stronger substan-

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[37]We standardize the coefficients in Figures 2 and 3 above for visualization and interpretation purposes. In the appendix, we have included regression tables with the unstandardized results.

tive impact on OTP decision-making compared to the OSV measure. In particular, a one standard deviation increase in judicial independence is linked with a 4.12 decrease in the likelihood that the OTP starts a preliminary examination against the government. The judiciary variable also performs well compared to the other variables in the model; it has the largest substantive impact among the theoretical variables of interest and performs well against the global coefficients for the control variables.

A similar picture emerges when considering the decision to initiate a preliminary examination targeting opposition actors. As Figure 3 demonstrates, increasing the level of one-sided violence perpetrated by opposition actors increases the likelihood that the OTP initiates a preliminary examination targeting the opposition, in line with H1. Specifically, we see that a one standard deviation increase in OSV is associated with a .96 increase in the likelihood that the OTP starts a preliminary examination against opposition actors.

In line with the logic of impartiality, judicial independence again reduces the likelihood of the OTP initiating a preliminary examination in the opposition model. Here, the coefficient estimate is -1.76, suggesting that a one standard deviation increase in the independent judiciary variable is associated with a 1.76 decrease in the likelihood of a preliminary examination targeting the opposition. Similar to the government model, the judiciary variable has the strongest substantive impact among the theoretical variables of interest.

At the first stage, therefore, when the OTP must decide whether to initiate a preliminary examination, it appears that the logic of impartiality does influence her decision-making, whether crimes have been perpetrated by government or opposition actors. Furthermore, the result also suggest that complementarity, as proxied by an independent judiciary, has a strong impact on OTP decision-making, relative to the other theoretical variables of interest.

The OTP's incentive to adhere to the ICC's legal mandate, however, does not consistently extend to the decision to advance a situation to a formal investigation. While the logic of impartiality suggests that the OTP should prioritize the worst human rights abuses at both decision points, the results in Figure 2 and Figure 3 indicate that the OTP is actually *less* likely to advance from a preliminary examination to a formal investigation as abuses against civilian populations increase. While this negative effect seems surprising at first, we suspect that the OTP may be wary of advancing to an investigation in situations where the ability of the court's investigators to safely carry out their investigations and the security of witnesses may be compromised.[38]

The effect of judicial independence is similarly weaker at the second stage. While more independent judiciaries reduce the likelihood of transition to formal investigations targeting opposition actors, as expected, judicial independence has no significant effect on the likelihood of moving from a preliminary examination to a formal investigation against government actors.

Regarding the substantive impact in the opposition model, we see that a one standard deviation increase in judicial independence is associated with a 4.02 decrease in the likelihood that OTP moves to a formal investigation. Despite this significant result, it is nonetheless important to note that in the second stage, we find no support for H1, and only mixed support for H2, suggesting that OTP decision-making is not primarily driven by the logic of impartiality in the second stage, when deciding whether to advance preliminary examinations to the formal investigation stage.

Unlike the logic of impartiality, the OTP's strategic incentives to consider P5 inter-

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[38]The deterrent effect of high OSV should be felt most at the second stage, when the OTP decides whether to initiate a formal investigation, as this stage requires a much greater OTP presence (i.e. investigators) on the ground.

ests suggested that the OTP would target actors in states with weaker ties to the P5 when deciding whether to initiate a preliminary examination or advance to a formal investigation (H3). We again find mixed support for this argument. At the first stage, the OTP does not seem to be driven by incentives to prioritize P5 interests: distance from P5 states has no significant effect on the initiation of a preliminary examination in either the government (Figure 2) or opposition (Figure 3) model. In other words, this result suggests that the OTP does not cater to powerful states' interests in an attempt to curry favor and increase their support for the court when deciding whether to open a preliminary examination targeting either government or opposition actors in a country.

At the second stage, on the other hand, P5 interests, as measured by ideal point distance, have a powerful effect on the OTP's decision-making. As demonstrated in Figures 2 and 3, the OTP is significantly more likely to advance a preliminary examination to the formal investigation stage against governments and opposition actors in states with weaker ties to powerful states (i.e. the P5). Substantively, we see that a one standard deviation increase in P5 ideal point distance is associated with a 5.5 and 5 increase in the onset of formal investigations in the government and opposition models, respectively.

The results for Africa are largely similar to those for the ideal point distance measure, as they vary across stages of ICC involvement. In the preliminary examination stage, Africa is only statistically significant in the opposition model. In particular, a one standard deviation increase is associated with a 1.10 increase in the likelihood that the OTP initiates a preliminary examination against opposition actors. Interestingly, the substantive impact of this variable is smaller than the other statistically significant variables and the the control variables. Thus, the relatively small substantive effect along with insignificant result in the government model raises important questions regarding the conventional wisdom of the so-called African bias, which claims that the OTP is

48

always more likely to target Africans because of African states' relatively smaller geo-strategic importance to powerful states.

On the other hand, we find that Africa is associated with a higher probability of formal examinations in both the government and opposition models. Not surprisingly, this variable produces the largest substantive effect in the second stage, as the coefficient estimates are 18.19 and 8.74 in the government and opposition models, respectively. These results are also in line with the findings from the ideal point distance measure for P5 interests. Taken together, the results for Africa across the two stages of the two models reinforces the conclusion that the OTP's decision-making is affected by the interests of powerful states primarily at the second decision point, when deciding whether to advance a preliminary examination to the formal investigation stage. The results for Africa also speak to the claim that the OTP is biased against Africa: the OTP's tendency to favor African targets appears to be largely limited to the formal investigation stage.

Turning briefly to control variables, we find that they behave largely as expected across the models. As a reminder, we only assess the global effects of the controls due to sparse data. As expected, in both the government and opposition models, both civil war and ICC ratification are significantly associated with a higher probability of ICC involvement. The results for polity, on the other hand, do not match expectations: polity is insignificant in the opposition model, and is positive and significant in the government model. This unexpected positive result is likely driven by high-profile examinations of government actors in strongly democratic states, including the US, UK, and Israel. We also see mixed results for GDP per capita; the measure is positive and significant in the government model, while it is negative and significant in the opposition model. While this result requires more research, it is not entirely surprising, given that we anticipated that economic development could affect OTP involvement in different ways with contradictory effects.

Discussion and Conclusion

Ultimately, our findings suggest that the OTP's decision-making is more complex than either critics or proponents of the court suggest: the OTP neither strictly adheres to its legal mandate, nor is it solely driven by the need to kowtow to powerful states' interests. Instead, the OTP acts more in accordance with its legal mandate when initiating preliminary examinations, but treads carefully around the interests of powerful states when considering which situations to advance to the formal investigation stage. A critical question is: why is this the case? Why does the OTP seem to prioritize impartiality when initiating preliminary examinations but allow powerful states' interests to sway decision-making when it comes to advancing to formal investigations? While providing a definitive answer to this question is beyond the scope of the current paper, we suspect that the answer comes down to competing pressures to avoid claims of bias while also avoiding situations that threaten powerful states' interests. Whether intentionally or not, the OTP's strategy to manage these often conflicting goals appears to have manifested in distinct responses at different stages. The chief prosecutor has worked to assert her office's independence and impartiality by initiating examinations that target powerful states. Yet, knowing investigations that threaten powerful states' interests are likely to receive staunch opposition from those powerful states, she ultimately fails to advance these cases, instead letting them languish at the examination stage.

This suggests that neither proponents nor critics of the ICC are fully correct. Proponents of the Court argue that it is a transformational institution with unprecedented authority to advance international criminal justice because of its independence and impartiality, while critics claim it is an ineffectual pawn of powerful states' interests. Our analysis shows that neither of these characterizations fully captures the complex nature

of OTP decision-making, thus speaking to an important policy debate with implications for the future functioning and legitimacy of the ICC.

Empirically speaking, our findings demonstrate that it is crucial to account for the different stages of OTP decision-making, as we did in this paper by employing a novel estimator that incorporates the different processes across preliminary examinations and formal investigations. In other words, our innovative empirical approach has allowed us to more accurately identify the factors associated with the OTP's selection criteria. In contrast, if we had failed to devise a empirical strategy that produces stage-specific coefficients, we would have reached erroneous conclusions about OTP and ICC behavior.

Our findings have significant implications for research on the ICC and international courts more broadly. With respect to the former, our findings provide a clear foundation for future research on the ICC's effectiveness. By systematically theorizing and providing rigorous empirical evidence regarding the OTP's situation-selection process, our research can inform modeling of the selection process that is critical to account for in order to derive unbiased findings on the ICC's impact on deterrence, peace, and justice.

The rapid expansion of the international judiciary over the past three decades has been characterized as "the single most important development of the post-Cold War age" (Romano, 1998, 709), and the ICC is indicative of this trend towards expansion of the international judiciary. Significant debate remains, however, over whether "new-style" international courts with increased power and authority are, in practice, actually autonomous institutions, or whether they are beholden to powerful states' interests. Our findings on the ICC's situation-selection process contributes to this debate, providing insights into how ICs may engage in strategic case selection, with implications for their independence. Our findings have implications not only for understanding the

behavior of ICs like the ICC, which has broad discretion to initiate preliminary and formal investigations, but for all ICs that have discretion when it comes to admissibility decisions (e.g. ECtHR, ICJ, ECJ, etc.). Control over admissibility decisions allows an IC "to decline to exercise its legal powers. In other words, international courts may be authorized not only to decide a legal case, but also to decide not to decide it." (Shany, 2016, 47), and this discretion allows ICs to potentially use admissibility decisions strategically to enhance their effectiveness and/or legitimacy (Shany, 2016, 53). In other words, our findings suggest that examining case selection, in addition to IC rulings, is relevant for understanding the autonomy and independence of international courts, and future research on IC autonomy must consider this selection process to fully understand constraints on IC autonomy.

Appendix

Model Layout

$$Likelihood:$$

$$Y_i \sim Continuation - Ratio(\mu_i, \tau_k)$$

$$Linear\,Model:$$

$$\mu_i = X_i\beta + W_i\eta_k + \alpha_j[i]$$

$$Priors:$$

$$\beta_p \sim T(0, 10, 3), \text{ for } p = 1, \ldots p$$

$$\eta_{qk} \sim T(0, 10, 3), \text{ for } q = 1, \ldots Q \text{ and } k = 1, \ldots, K-1$$

$$\tau_k \sim N(0, 1.5), \text{ for } k = 1, \ldots, K-1$$

$$\alpha_j \sim N(0, \sigma_\alpha)$$

$$Hyperpriors:$$

$$\sigma_\alpha \sim Exponential(2)$$

To describe our model we use the convention in McElreath (2016). The first two lines describe the likelihood and linear model and the remaining define the prior distribution for each parameter in the model. Let Y_i be a particular country-year observation's score on our dependent variables. Both of our dependent variables take an integer value of $k = 1, \ldots, K$. The framework we presented in our paper treats Y_i as a function of a normally-distributed latent variable with a mean of μ and a standard deviation of 1. The $k = 1, \ldots, K-1$ threshold parameters, τ, partition this distribution into K sections. The area of each of these sections describe the probability of falling into each response

category.

To model changes in these probabilities, the models assume μ to be an additive combination of linear effects. We parameterize this model via first a set of variables, X that are thought to effect the probability of falling into a particular category equally and the effect of these variables is captured by a P length vector of coefficients, β. We also include Q variables that have category specific effects and these are denoted by W and their effect is measured by η. α represents a set of varying effects that account for country-ICC case specific unmeasured variation.

For both the *State- and Opposition-Focused ICC Transition* models we utilize the same set of prior distributions. For β and η we use Student's t priors with three degrees of freedom. For the threshold parameters, τ, we use a Normal distribution with a mean of zero and standard deviation of 1.5. We also use normally distributed priors for α and set the mean to zero and standard deviation to σ_{α}, which has its own Exponential hyperprior with a rate of 2.

Trace Plots for Results from State and Opposition Models

Below we show trace plots, after a burn-in period of 4,000 iterations, for both the *State- and Opposition-Focused ICC Transition* dependent varibales. In both cases, we can see that the chains seem to be mixing well and have converged.
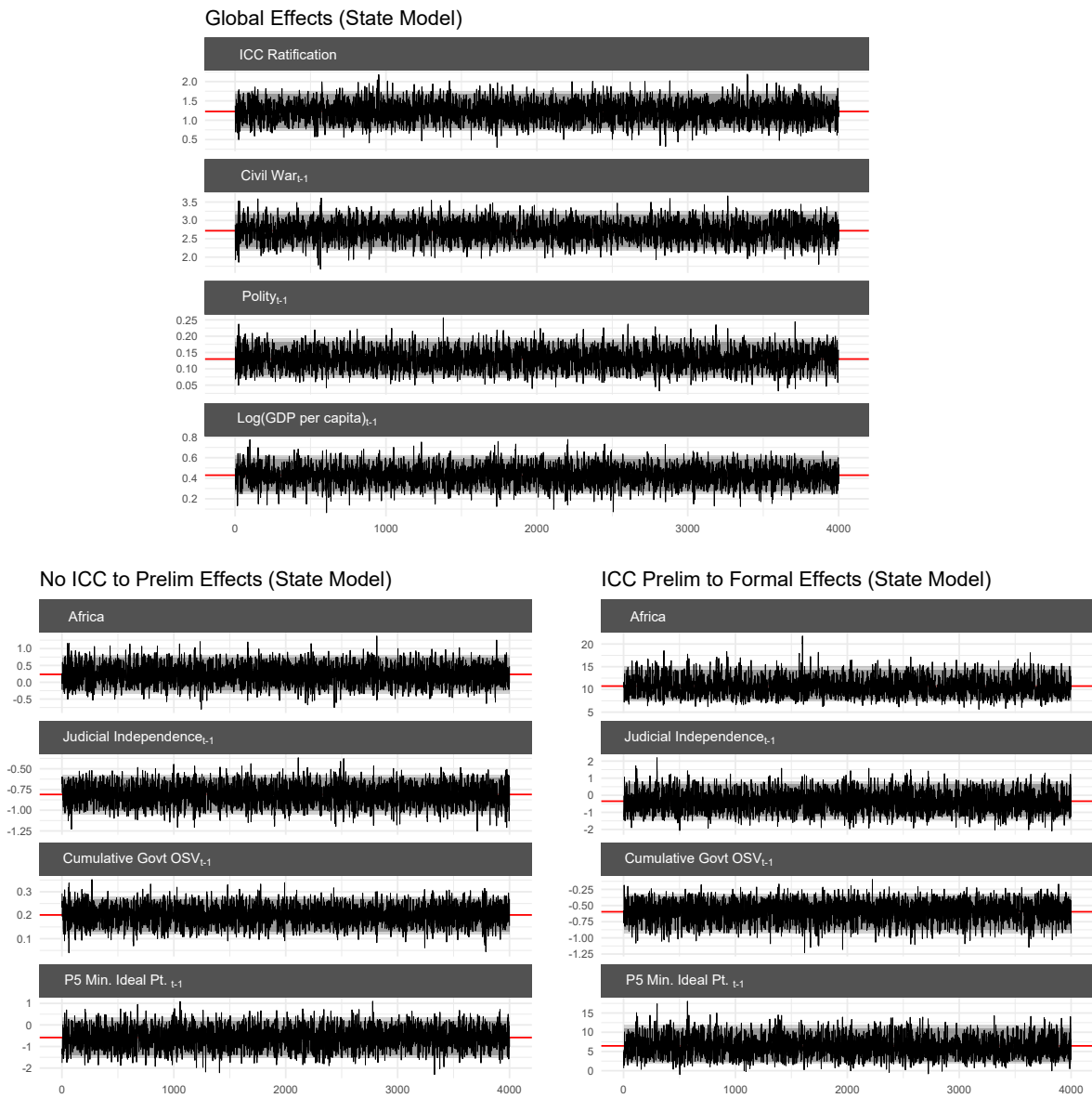
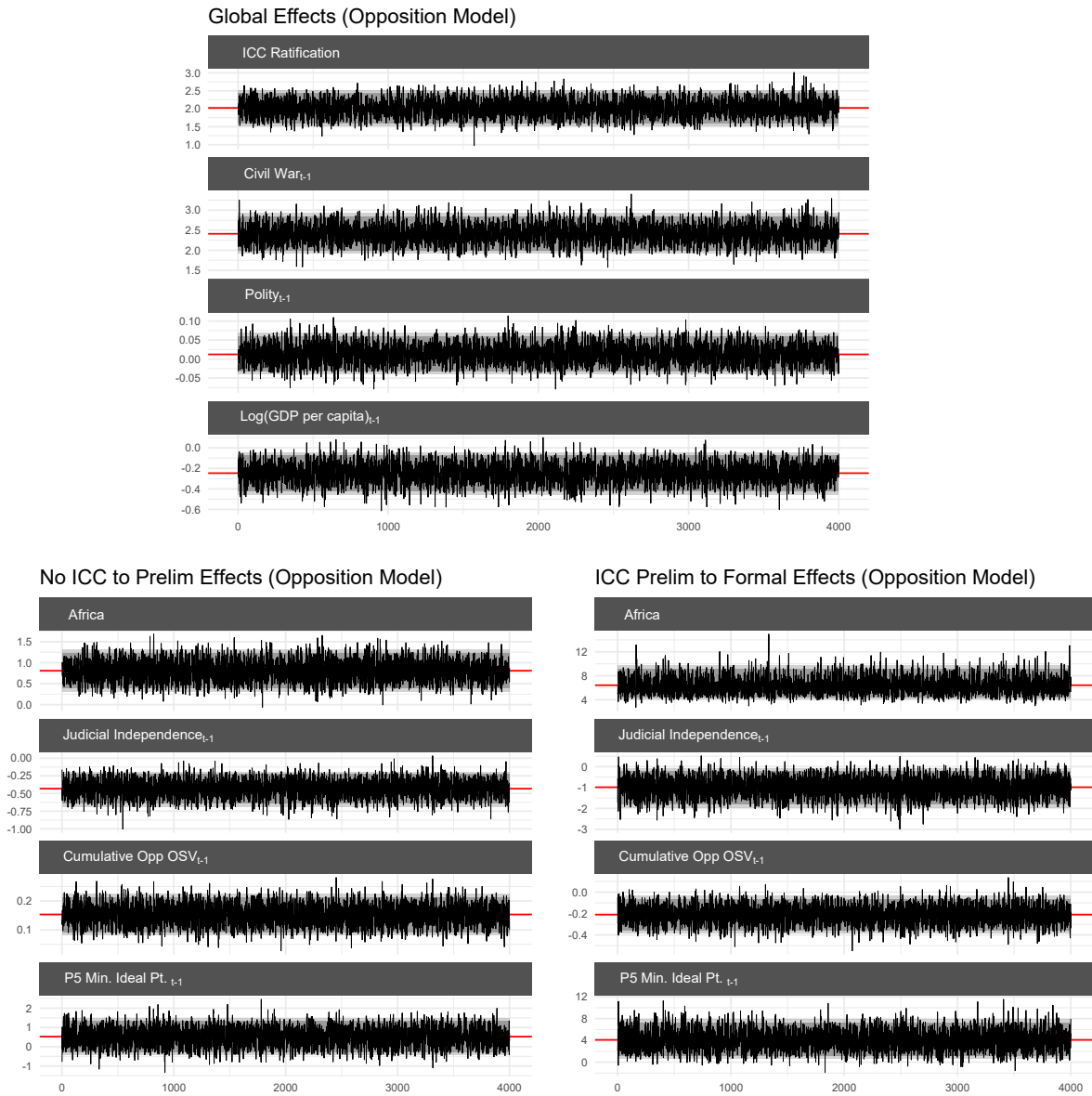**Figure A1:** Trace plot for *State-Focused ICC Transition* model.

Figure A2: Trace plot for *Opposition-Focused ICC Transition* model.

Tabular Representation of State and Opposition Models

Below we present results with the unstandardized parameter estimates from the results presented in our paper.

	Estimate	Est.Error	Q2.5	Q97.5
Global Effects				
Log(GDP per capita)$_{t-1}$	0.43	0.09	0.24	0.62
Polity$_{t-1}$	0.13	0.03	0.07	0.19
Civil War$_{t-1}$	2.72	0.27	2.18	3.25
ICC Ratification	1.23	0.27	0.72	1.75
No ICC to Prelim Effects				
P5 Min. Ideal Pt.$_{t-1}$	-0.58	0.47	-1.53	0.35
Cumulative Govt OSV$_{t-1}$	0.20	0.04	0.12	0.28
Judicial Independence$_{t-1}$	-0.81	0.12	-1.05	-0.58
Africa	0.24	0.29	-0.32	0.81
ICC Prelim to Formal Effects				
P5 Min. Ideal Pt.$_{t-1}$	6.46	2.59	1.83	11.89
Cumulative Govt OSV$_{t-1}$	-0.60	0.16	-0.93	-0.32
Judicial Independence$_{t-1}$	-0.35	0.58	-1.43	0.84
Africa	10.74	2.00	7.42	15.16

Table A.1: Parameter estimates for *State-Focused ICC Transition* model.

	Estimate	Est.Error	Q2.5	Q97.5
Global Effects				
Log(GDP per capita)$_{t-1}$	-0.25	0.11	-0.45	-0.04
Polity$_{t-1}$	0.01	0.03	-0.04	0.07
Civil War$_{t-1}$	2.41	0.26	1.92	2.93
ICC Ratification	2.02	0.26	1.53	2.52
No ICC to Prelim Effects				
P5 Min. Ideal Pt.$_{t-1}$	0.53	0.49	-0.44	1.45
Cumulative Opp OSV$_{t-1}$	0.15	0.04	0.08	0.22
Judicial Independence$_{t-1}$	-0.43	0.13	-0.69	-0.19
Africa	0.81	0.25	0.31	1.32
ICC Prelim to Formal Effects				
P5 Min. Ideal Pt.$_{t-1}$	4.10	1.87	0.70	8.02
Cumulative Opp OSV$_{t-1}$	-0.21	0.09	-0.38	-0.04
Judicial Independence$_{t-1}$	-0.98	0.48	-1.95	-0.06
Africa	6.42	1.46	4.04	9.76

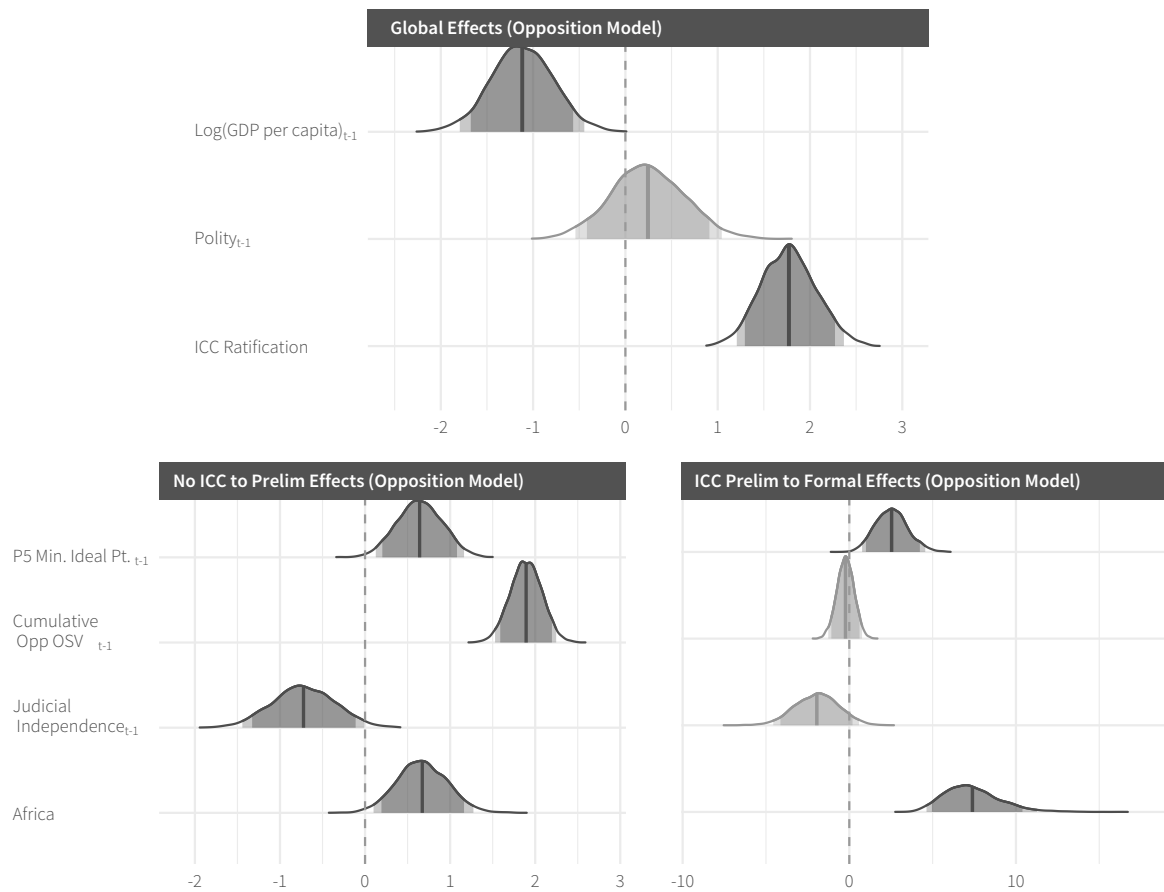**Table A.2:** Parameter estimates for *Opposition-Focused ICC Transition* model.
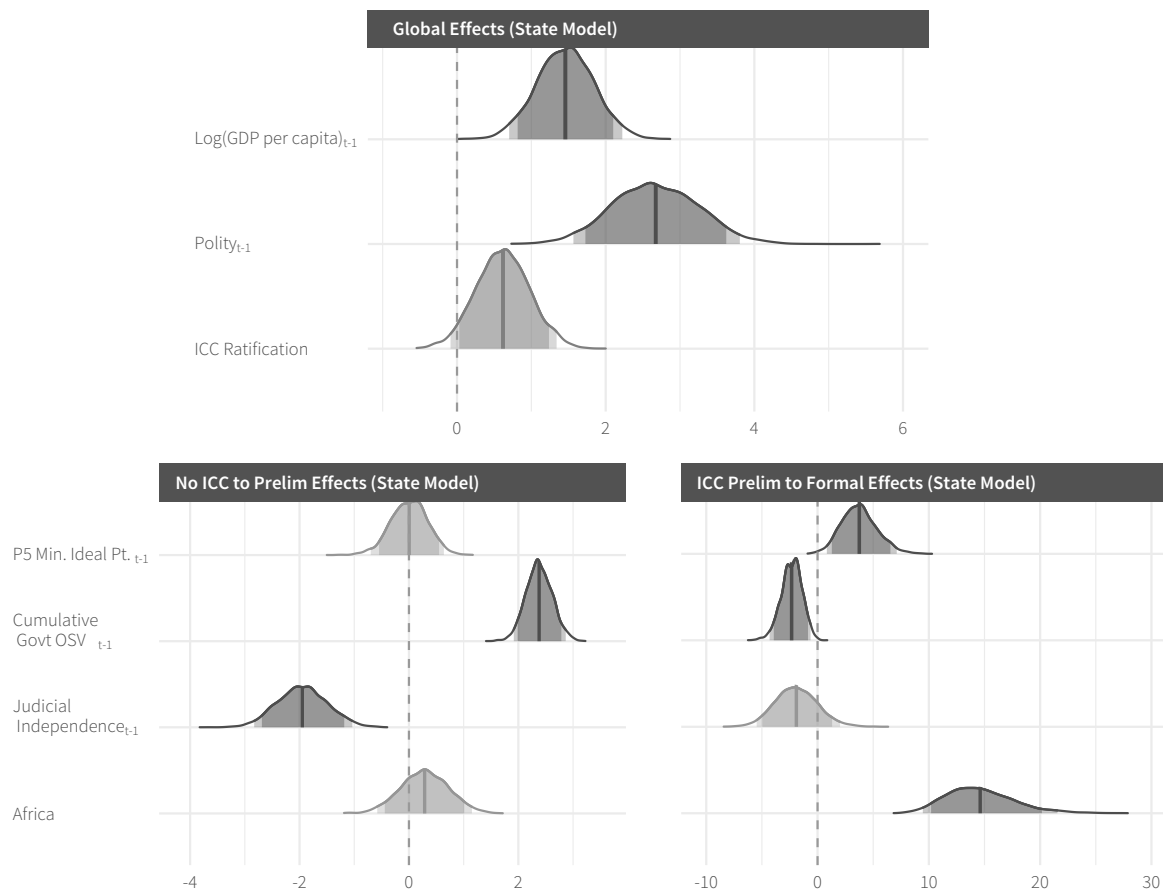
Figure A3: Parameter estimates when restricting sample to PTS greater than three and only ICC ratifiers from State-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 95% credible interval, and darker shaded portion the 90% credible interval.

PTS & ICC Ratifier Robustness Check

We examine the robustness of our results to a sample restriction. Specifically, we subset our sample to those cases where the PTS value is greater than three and only includes ICC ratifiers. Results are shown below and are broadly similar to what we report in the paper.

Figure A4: Parameter estimates when restricting sample to PTS greater than three and only ICC ratifiers from Opposition-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 95% credible interval, and darker shaded portion the 90% credible interval.

Parameter estimates when using listwise deletion

To make sure that our results are not being driven by our multiple imputation procedure we also run a version of our sampler in which we employ listwise deletion. The results are shown below and are similar to those reported in the paper.
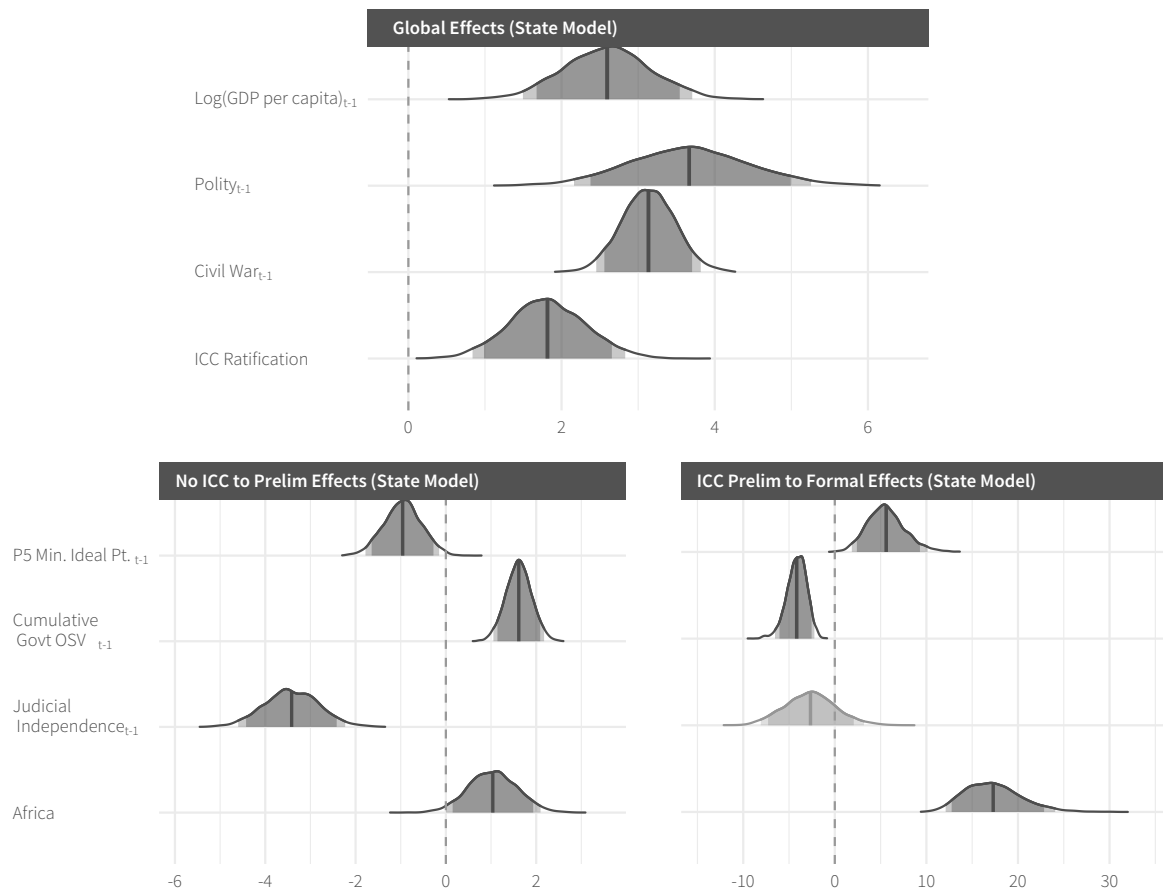
Figure A5: Parameter estimates when using listwise deletion from State-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 95% credible interval, and darker shaded portion the 90% credible interval.
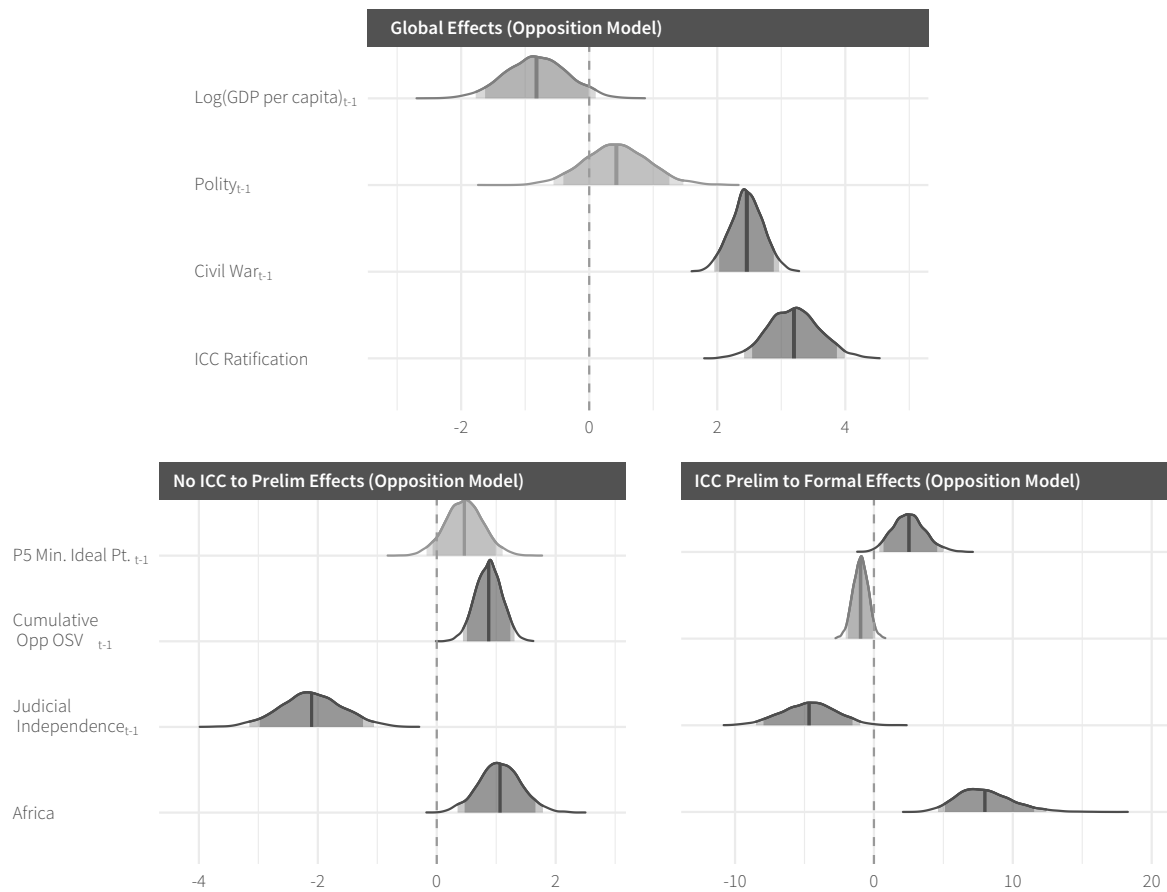
Figure A6: Parameter estimates when using listwise deletion from Opposition-Focused ICC Transition model visualized through posterior distributions with median values designated by vertical line, lightly shaded portion indicating the 95% credible interval, and darker shaded portion the 90% credible interval.

Comparison with alternative frameworks

To highlight the utility of our approach, the partial continuation ratio model, we compare it with two alternative frameworks. Specifically, a standard ordinal model and a continuation ratio model that does not have any category specific effects. In the coefficent plots below, we show parameter estimates for each of the independent variables. As we can see the substantive results from our framework differ quite notably from either of the alternatives for both the *State- and Opposition-Focused ICC Transition* models.

Additionally, we compare the performance of each of these models in a predictive exercise. To assess which model is performing better we use an ordinal fit statistic, specifically, Somer's D, a rank correlation coefficient (Somers, 1962). This is simply a measure of association for ordinal variables that works by essentially calculating the correlation between predicted and observed values. Similar to other correlation coefficients, Somer's D ranges from -1 to 1, where 1 indicates more rank agreement values. Results are summarized in Figure A9 below, and they show that our framework outperforms the alternatives for both models.
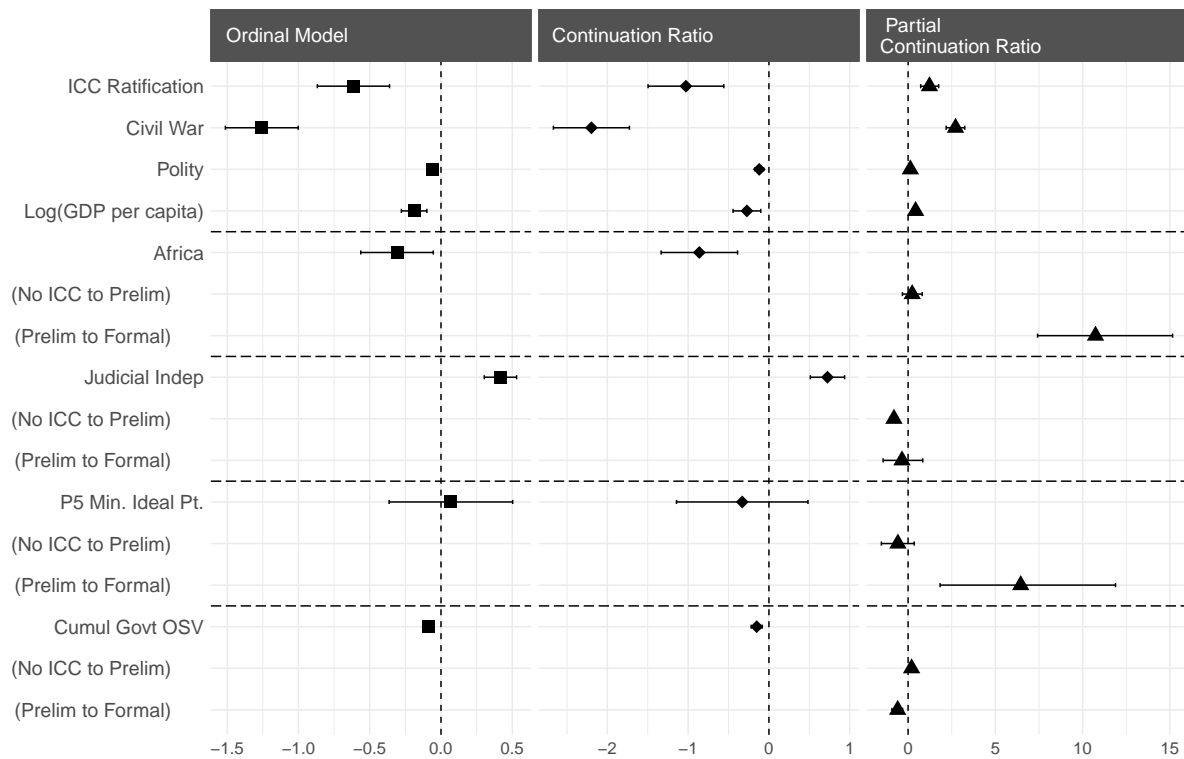
Figure A7: Parameter estimates from State-Focused ICC Transition model when using ordinal (square), continuation ratio (diamond), and partial continuation ratio models (triangle). The horizontal lines indicate the 95% credible interval around the average estimated effect.
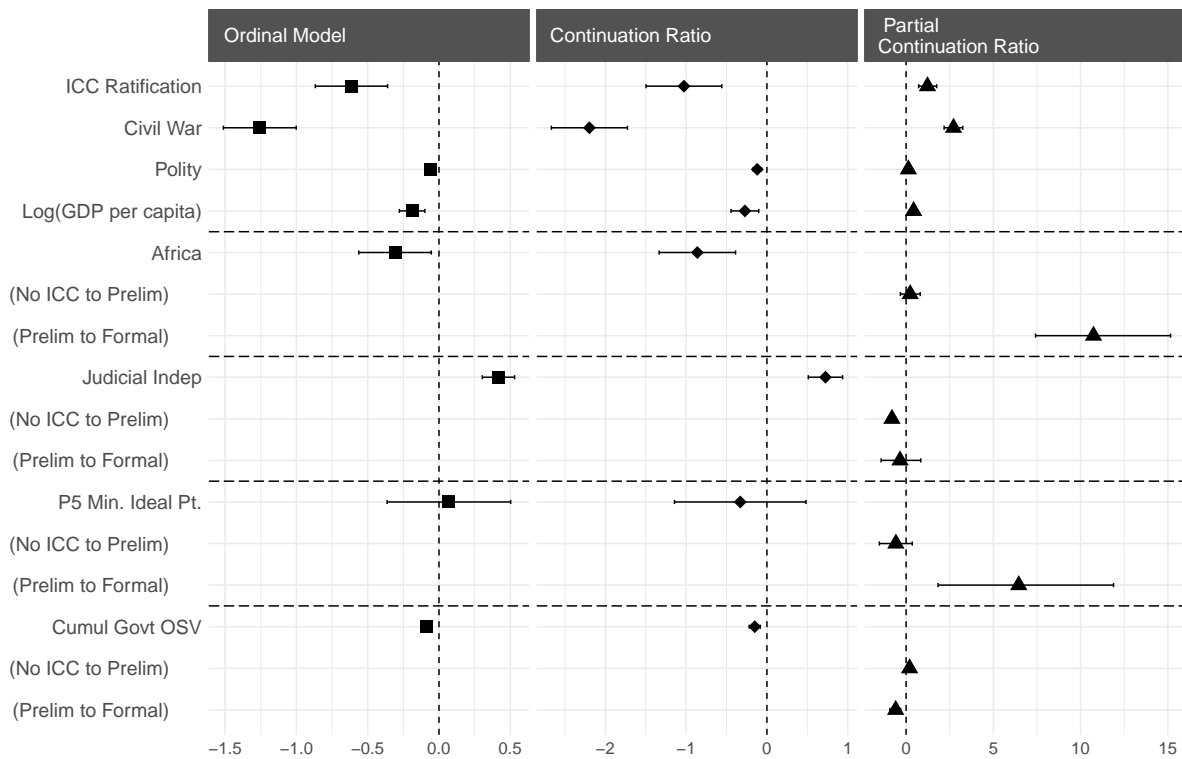
Figure A8: Parameter estimates from Opposition-Focused ICC Transition model when using ordinal (square), continuation ratio (diamond), and partial continuation ratio models (triangle). The horizontal lines indicate the 95% credible interval around the average estimated effect.
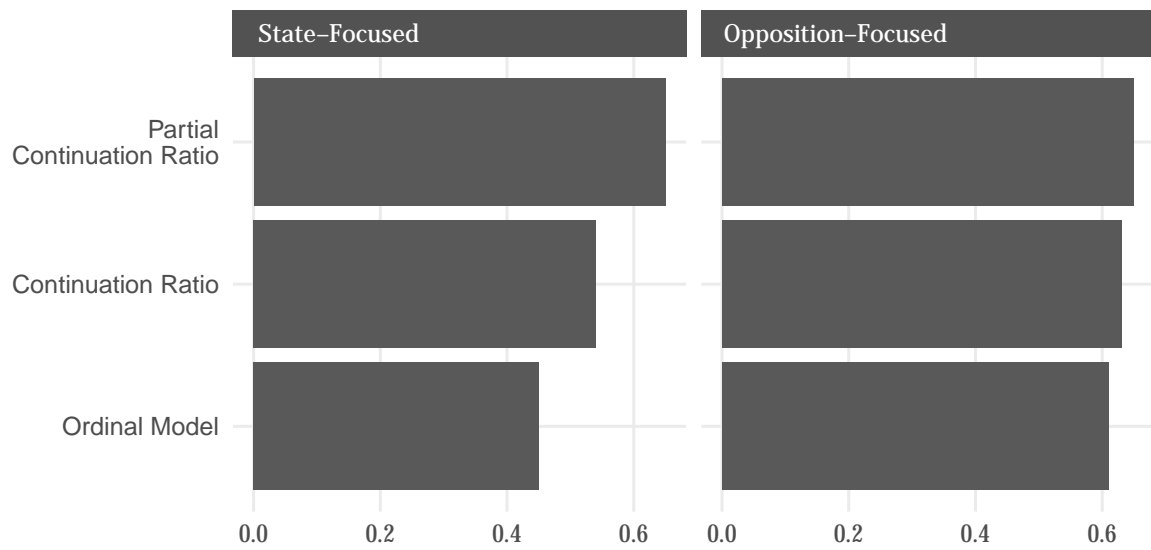
Figure A9: Performance comparison.

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